SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-379

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

APPENDIX TO BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX TO BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

Order Defining Classes, Tentatively Approving Settlement, etc., signed by Honorable Roszel C. Thomsen, Senior United States District Judge on September 21, 1974. .A3

Exhibit B to Order — Plan for Distribution of the Class Settlement Fund A24

Class Action Notice Mailed to State of Ohio and Other Class Members A28

Final Judgment Approving Settlement and Plan of Distribution and Dismissing Claims With Prejudice, Entered by the United States District Court of the Western District of Oklahoma on December 4, 1972 .....A39

NOTE

The items printed in the Appendix have been reproduced from the appendix in the proceedings before the United States Court of Appeals for the Tenth Circuit. The bracketed numbers indicate the page numbers in the record on appeal before the Tenth Circuit.

APPENDIX

ORDER DEFINING CLASSES, TENTATIVELY APPROVING SETTLEMENT, ETC.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION
(M. D. L. DOCKET NO. 55)

[792]
ORDER

The Court has been advised that all plaintiffs in Civil Actions Nos. 70-375, 71-349, 71-354, 71-582, and 71-353 (hereinafter "these class actions") and all other plaintiffs in M.D.L. Docket No. 55 now represented by counsel of record for plaintiffs in these class actions, acting by their counsel, and those defendants therein who have by their counsel executed and filed the Certificate of Consent annexed hereto as Exhibit G[1], have agreed, subject to Court approval following notice and hearing, to settle upon the terms and conditions herein set forth these class actions and all claims which have been or could be asserted by or on behalf of the classes as defined in paragraph 5 hereof (the "classes") or any member thereof, arising out of or relating to certain companies herein collectively referred to as "the Four Seasons companies," *viz:* Four Seasons Nurs-

[1] Such plaintiffs are hereinafter referred to as "consenting plaintiffs." Such defendants are hereinafter referred to as "consenting defendants." Such plaintiffs and defendants collectively are hereinafter referred to as "consenting parties."

ing Centers of America, Inc. ("America"), Four Seasons Franchise Centers, Inc. ("Franchise"), Four

[793]

Seasons Overseas, N.V. ("Overseas"), Four Seasons Equity Corporation ("Equity"), FSN Corporation ("FSN"), Four Seasons United, Four Seasons Investors, Four Seasons Nursing Centers of the West, Inc., Four Seasons Nursing Centers of the South, Inc., and other related or affiliated companies, or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment as provided for in paragraph 11 hereof, whether asserted in these class actions or not, including but not limited to claims that defendants or any of them or any other person violated the Federal Securities Act of 1933, §§ 5, 11, 12 and 17, and the Federal Securities Exchange Act of 1934, §§ 9 and 10(b), in that:

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Franchise, Overseas, Equity, FSN, and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America,

Franchise, Overseas, Equity, FSN and related or affiliated companies.

All of the above-described claims are herein collectively referred to as the "settled claims."

The Court has further been advised that the settlement of these class actions is to be made in conjunction with and contingent upon the settlement of four plenary actions (hereinafter the "Trustee actions")

[794]

instituted in this Court by the Trustee (hereinafter the "Trustee") in the Chapter X proceedings for reorganization of certain of the Four Seasons companies now pending in this Court (hereinafter "reorganization proceedings"), in accordance with the terms and conditions set forth in the application and proposed order annexed hereto as Exhibit A, which application and proposed order are being submitted to United States District Judge Luther Bohanon, before whom the reorganization proceedings are pending.

The Court has further been advised that in settlement of these class actions and the Trustee actions, certain of the defendants or persons on their behalf have severally agreed, subject to the terms and conditions hereof, to contribute various amounts towards the settlement aggregating $8,500,000 in cash (hereinafter the "Settlement Fund") and to release or procure the release of certain claims aggregating in excess of $1,000,000 heretofore filed against the debtor estates in the reorganization proceedings and defendant Walston & Co., Inc. ("Walston") has also agreed to release and discharge such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity. Of

the $8,500,000, the amount of $7,000,000 (hereinafter the "Class Settlement Fund") is to be paid in settlement of these class actions and the amount of $1,500,000 is to be paid to the Trustee, together with the release of the claims against the debtor estates referred to above, in settlement of the Trustee actions.

[795]

Plaintiffs' counsel in these class actions and the Trustee have advised the Court, and this Court hereby finds, that the proposed settlement[2] will materially expedite the termination of the reorganization proceedings and will enhance the value of shares of the reorganized company to be distributed to members of the classes pursuant to the Plan of Reorganization heretofore approved by the Court in the reorganization proceedings.

The parties have agreed and the Court directs that this Order and all papers related to it are not, and shall not be construed as, an admission by defendants or any of them that any of the claims asserted state a cause of action against any defendant, of the validity of any claims asserted in any of the actions or of the liability of any defendant therein or of any wrongdoing by any of them or of any violation of law by any of them, or of any deficiencies or misstatements in any of the registration statements, financial statements or other documents involved, nor are they a concession nor shall they be used as any admission of any fault or omission in any oral or written statement or document or financial report heretofore issued, filed, made, reviewed, or authorized by any defendant. Neither this Order, nor any paper related to it, nor any of the terms thereof shall be offered or received in evidence in any civil, crim-

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[2] Unless the context otherwise requires, the term "proposed settlement" as used in this Order means the overall settlement of the settled claims as proposed and defined by the terms and conditions of this Order and exhibits thereto, and includes settlement of these class actions and the Trustee actions.

inal or administrative action or proceeding as an admission of wrongdoing on the part of any defendant, or as an admission by any plaintiff that the consideration to be given hereunder represents the maximum amount which could be recovered. Defendants have denied, and they continue

[796]

to deny, the charging averments in all of the complaints, including the averments that any plaintiff suffered any monetary damage.

Counsel for the consenting parties have requested the Court to establish classes for settlement purposes only to effectuate the proposed settlement. The Court has reviewed the terms and conditions of the proposed settlement and the Court file, including transcripts of pretrial hearings and testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and extensive briefs therein.

The Court finds and determines that the proposed settlement and the Plan for Distribution of the Class Settlement Fund annexed hereto as Exhibit B (the "Plan of Distribution") appear, *prima facie*, and subject to the right afforded any interested party by paragraph 10 hereof and consideration of any matters which may be presented at the hearing referred to in paragraph 9 hereof, to be fair, reasonable, equitable and adequate.

For the purpose only of effectuating the proposed settlement and subject to the effectuation of the proposed settlement the Court hereby finds and determines with respect to each of the classes that:

(a) The members of such class are so numerous that joinder of all members is impracticable;

(b) There are questions of law or fact common to such class;

(c) The claims of the representative parties in these class actions are typical of the claims of such class;

(d) The representative parties in these class actions will fairly and adequately protect the interests of such class;

(e) The questions of law or fact common to the members of such class predominate over any questions affecting only individual members of such class;

[797]

(f) A class action is superior to other available methods for the fair and efficient adjudication of the controversy;

(g) The notice to be given members of such class pursuant to this Order is the best notice practicable under the circumstances, adequate provision has been made herein for individual notice to all members of such class who can be identified through reasonable effort, and such notice meets all requirements of Rule 23, F.R.Civ.P., and the Constitution of the United States.

NOW, THEREFORE, IT IS HEREBY ORDERED for purposes only of effectuating the proposed settlement and subject to further order of this Court, that:

1. The proposed settlement and Plan of Distribution are conditionally approved for submission to members of the classes.

2. These class actions shall be maintained as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure and the named plaintiffs in these class actions are hereby designated to represent the classes.

3. No other action now pending or hereafter assigned to this Court under M.D.L. Docket No. 55 shall be maintained as a class action.

4. Except as provided hereby or by further Order of this Court, for good cause shown, all persons other than the representative parties in these class actions are hereby enjoined, during the pendency of these settlement proceedings, from filing or prosecuting purported class actions against any person whomsoever with respect to any of the settled claims on behalf of either of the classes or any purported class actions on behalf of any portion thereof.

5. The classes are defined as follows:

[798]

(a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

6. The notice to members of the classes annexed hereto as Exhibit C and the Proof of Claim forms annexed hereto as Exhibits D-1 and D-2 are hereby authorized and approved. James R. Tolbert, III, the duly appointed, acting and qualified Trustee of America, Franchise, Overseas,

Equity, and FSN, having agreed thereto, is hereby authorized and directed to mail, on or before October 2, 1972, notice and Proof of Claim forms (in substantially the same form as Exhibits C, D-1 and D-2) to each member of the classes whose identity and address is known to him or whose name is furnished to him by any of the parties, at such member's last known address, and to cause notice (in substantially the same form as Exhibit C) to be published one time, on or before October 6, 1972, in the national edition of The Wall Street Journal. Proof of such mailing and publication, in accordance herewith, shall be filed in this Court as soon as practicable.

[799]

7. The sum of $25,000 shall be forthwith advanced to the Trustee by the consenting defendants in proportion to the cash contributions to be made by them or on their behalf to the Settlement Fund. Such sums shall be consolidated in a single check payable to the Trustee in order to preserve the confidentiality of the several contributions. The sums so advanced shall be credited against contributions due to be made by said defendants to the Class Settlement Fund. In the event the settlement is not finally approved, any amounts so advanced and not actually used by the Trustee for the notice and claims processing contemplated hereby shall be reimbursed forthwith to the defendants, and the amounts not reimbursed may be taxed as costs upon ultimate termination of these class actions. In the event the sum advanced is not sufficient to reimburse the Trustee in full for all expenses incurred, the consenting plaintiffs shall advance to him on demand such additional amounts as may be necessary, which may be similarly taxed as costs.

8. Members of the classes who desire to be excluded therefrom in these class actions must, no later than November 1, 1972, file with the Clerk of this Court a written re-

quest to be excluded, which it is requested be made on a form in substantially the form annexed hereto as Exhibit E, which form is hereby approved and may be obtained from the Trustee upon written request. Each member who fails to file a timely request to be excluded shall be bound by any judgment or order entered in these class actions, whether favorable or not, in connection with these settlement proceedings. No consenting plaintiff shall have the right to be excluded. Upon the request of any defendant in these class actions who is also a defendant in any other action or actions

[800]

relating to transactions in the securities of any of the Four Seasons companies, the Trustee is authorized and directed to serve by registered mail a copy of this Order and its exhibits, including the notice annexed hereto, upon all named parties to such other action or actions. All such parties who are members of either or both of the classes and do not duly and timely request exclusion therefrom shall be bound by any judgment or orders entered in these class actions in connection with these settlement proceedings.

9. A hearing shall be held before this Court in the United States Courthouse, Oklahoma City, Oklahoma, on November 16, 1972, at 10:00 A.M., unless said hearing is adjourned by order of the Court, whether pursuant to paragraph 15 hereof or otherwise, for the purpose of determining whether the proposed settlement and the Plan of Distribution are fair, reasonable, equitable, and adequate and, in the event the proposed settlement be approved, whether a final order and judgment should be entered approving said settlement and said Plan of Distribution, dismissing with prejudice all claims asserted in these class actions, passing upon applications for fees and allowances in connection with the settlement, and taking the other action contemplated by paragraph 11 hereof.

10. At the hearing referred to in paragraph 9 hereof, any person affected by this Order may appear and show cause, if any he has, why (a) the settlement of these class actions should not be approved by the Court and final judgment dismissing these class actions with prejudice should not be entered; (b) the Plan of Distribution should not be approved by the Court (approval of which Plan in the form annexed shall

[801]

not be a condition of the proposed settlement); (c) attorneys' fees and disbursements should not be awarded, in such amount as the Court may allow, to class plaintiffs and their counsel; and (d) any other action contemplated by paragraph 11 hereof should not be taken, provided, however, that no objector to the settlement, Plan of Distribution, allowances or other actions will be heard and no papers or briefs submitted by or on behalf of any such objector will be received or considered by the Court at or in connection with such hearing unless, on or before November 1, 1972, notice of intention to appear and copies of all such papers and briefs are filed with the Clerk of this Court and are mailed to each of: Thomas W. Kelly, Esq., Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, Charles W. Boand, Esq., Wilson & McIlvaine, 135 South LaSalle Street, Chicago, Illinois 60603, and Arthur F. Mathews, Esq., Wilmer, Cutler & Pickering, 900 17th Street, N.W., Washington, D.C. 20006, counsel for certain defendants, and each of: Marvin Cherner, Esq., 516 Brown-Marx Building, Birmingham, Alabama 35203, Ira Jay Sands and Robert B. Levin, Esqs., 701 Seventh Avenue, New York, N.Y. 10036, J. Vernon Patrick, Esq., Berkowitz, Lefkovits & Patrick, 1400 City National Bank Building, Birmingham, Alabama 35203, and Harry A. Young, Jr., Esq., Neistein, Richman, Hauslinger & Young, Ltd., 33 North LaSalle Street, Chicago, Illinois 60602, counsel for the respective named plaintiffs in these class actions,

and: Robert C. Bailey, Esq., 600 Hightower Building, Oklahoma City, Oklahoma 73102.

[802]

11. If the Court, after the hearing referred to in paragraph 9 hereof, shall finally approve the proposed settlement, a final judgment[3] of this Court will be entered in M.D.L. Docket No. 55—All Cases, which final judgment will:

(a) Dismiss without costs, with prejudice and on the merits each and all of these class actions and all settled claims as to all members of the classes who have not duly and timely requested exclusion therefrom.

(b) Dismiss without costs, with prejudice and on the merits all other actions in M.D.L. Docket No. 55 by consenting plaintiffs and by any other plaintiff who is a member of either of the classes who does not duly and timely request exclusion therefrom.

(c) Dismiss without costs, with prejudice and on the merits the derivative causes of action in all M.D.L. Docket No. 55 cases.

(d) Require each member of the classes who claims a right to participate in the Class Settlement Fund to execute and deliver, as part of his Proof of Claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 hereto, which release has been deemed sufficient by all consenting parties.

(e) Require all consenting parties to perform the acts called for by this settlement and to execute and deliver such other and further documents and papers as the Court deems advisable to effectuate and finalize the settlement.

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[3] As used in this Order, "final judgment" means a judgment entered in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

(f) Bar forever the prosecution against the defendants or anyone else of any and all settled claims by any member of the classes, except by persons who have duly and timely requested exclusion therefrom.

(g) Bar forever all members of the classes who request exclusion therefrom pursuant to paragraph 8 hereof from instituting, maintaining or participating in any class action asserting or relating to any or all of the settled claims against any person whomsoever.

(h) Provide that the consenting defendants and their counsel, except as herein expressly provided, shall have no responsibility or obligation to participate in or to perform any acts in furtherance or performance of this settlement after final judgments dismissing these class actions and the Trustee actions shall no longer be subject to appellate review.

[803]

(i) Provide that plaintiffs' attorneys of record in these class actions shall not in any proceeding in M.D.L. Docket No. 55 or in any other proceeding or litigation represent any person (whether a party hereto, a member of either class, one who requests exclusion from the classes pursuant to paragraph 8 hereof, or anyone else) who asserts against any defendant or anyone else any claim arising out of or relating to the subject matter of any of the settled claims.

(j) Provide that the Court shall have and retain jurisdiction (1) to allow attorneys' fees and disbursements to class plaintiffs and their counsel, and (2) with respect to overall matters relating to the class settlement and Plan of Distribution, as annexed hereto or as modified by the Court, including the proof and allowance of claims and decisions of related issues of fact and law and determination of the time, mode and

amounts of all payments out of the balance of the Class Settlement Fund, aided in the event the Court deems necessary by such master or masters as may be appointed.

12. All cash contributions by or on behalf of the defendants to the Settlement Fund shall be made no later than ten (10) days after the later of the entry of the final judgment pursuant to paragraph 11 of this Order and the entry of the final judgment pursuant to the application which is annexed hereto as a part of Exhibit A. Payment shall be made by certified or cashier's checks payable in New York, Chicago or Oklahoma City funds delivered to the Escrow Agent in Oklahoma City in accordance with the Escrow Agreement attached hereto as Exhibit F. All such contributions by or on behalf of the defendants shall be made in accordance with signed commitments to contribute cash aggregating $8,500,000, filed under seal with Senior United States District Judge Roszel C. Thomsen contemporaneously with the entry of this Order.* The respective commitments to make such contributions by or on behalf of any defendant are and shall be several and not joint, and, as to the insurors of certain defendants, are conditioned upon the insurors' receipt of such releases and documents as they may reasonably require from their assureds, including persons not defendants in these class actions; moreover, the contribution to be made on behalf of the Estate of Amos D. Bouse,

[804]

deceased, is subject to approval by the Court having juris-

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* With respect to the contribution of defendant Tom J. Gray, the executed commitment to contribute shall be filed on or before October 4, 1972.

With respect to the contribution, under Lloyd's policies numbered 80514810000, 80514820000, and 80514830000, the executed commitment shall be filed on or before October 10, 1972.

diction of the administration of the Estate. The amounts of such respective commitments shall be kept confidential except for the agreed contribution to be made by any defendant who defaults in his commitment to make payment when due hereunder. Members of the classes shall share in so much of the Class Settlement Fund as is available for distribution to the classes in the manner, to the extent and upon the terms and conditions set forth in the Plan of Distribution or as such Plan may be modified by the Court.

13. Except as herein provided, the proposed settlement and all proceedings in furtherance thereof shall be null and void in the event that the District Court declines to enter final judgments in the class actions and in the Trustee actions in accordance with the terms of this Order and Exhibit A thereto, or in the event that such final judgments or any of them are vacated or reversed, in whole or in part, by a decision of an appellate court; provided, however that the refund provisions of the Escrow Agreement, to the extent that they provide for the return of cash contributions to the participating contributors, shall be valid and performed.

14. The Trustee, any consenting defendant by his counsel of record herein, and any counsel now of record for the named plaintiffs in these class actions, shall have the right to withdraw from and terminate the proposed settlement within ten (10) days after the occurrence of any one or more of the following events:

(a) If final judgments are not entered by the District Court on or before December 31, 1972 dismissing both these class actions and Trustee actions in accordance with the terms of this proposed settlement; or

[805]

(b) If a stipulation dismissing the appeal from the plan of reorganization in the reorganization proceed-

ings filed on behalf of Lowell S. Fink, et al., in the United States Court of Appeals for the Tenth Circuit, and conditioned upon the judgment herein provided for becoming final and non-appealable, is not filed within 30 days after the entry of this Order; or

(c) If a stipulation dismissing the appeal from the plan of reorganization in the reorganization proceedings filed on behalf of Charles O. Finley in the United States Court of Appeals for the Tenth Circuit, and conditioned upon the judgment herein provided for becoming final and non-appealable, is not filed within 30 days after the entry of this Order; or

(d) If releases or withdrawals of the claims described in Exhibit A hereto are not delivered as required thereby within 30 days after the entry of this Order; or

(e) If by October 27, 1972 the Court having jurisdiction of the administration of the Estate of Amos D. Bouse, deceased, shall not have entered an Order approving and authorizing the contribution to be made by the Estate to the Settlement Fund in accordance with the signed commitment heretofore filed wth this Court and described in paragraph 12 hereof; or

(f) If the commitment as to Lloyd's policies referred to in the footnote to paragraph 12 is not filed on or before October 10, 1972.

(g) If the commitment as to Tom J. Gray referred to in the footnote to paragraph 12 of the certificate of consent of counsel for Tom J. Gray are not filed on or before October 4, 1972.

15. Each consenting defendant, by his counsel of record herein, shall have the right to withdraw from and terminate the proposed settlement on or before November 9,

1972, if the insurance companies participating in and contributing to the Settlement Fund shall not have either received the releases and documents referred to in paragraph 12 hereof by not later than November 6, 1972 or waived their right to receipt of any not furnished by such date. In the event of such withdrawal and termination, the amounts advanced by the consenting defendants pursuant to paragraph 7 shall not be taxable as costs. Each consenting defendant, by his counsel of record herein, shall also have the right to withdraw from and terminate the proposed settlement if requests for exclusion from the c es are filed by potential members of said classes having aggregate potential claims of $4,000,000 or more. Such right must be exercised on or before November 9, 1972, provided, however, that each consenting defendant shall have the right to extend

[806]

the time which any consenting defendant has to exercise the right to withdraw conferred hereby to and including any date on or before December 8, 1972, by filing written notice on or before November 9, 1972 with the Clerk of this Court, and mailing a copy thereof to Senior United States District Judge Roszel C. Thomsen, the Trustee's counsel, and each counsel of record in M.D.L. Docket No. 55. In the event such notice is filed, the hearing provided for in paragraph 9 hereof shall be convened, but shall be adjourned by the Court to such time and date as may be then ordered by the Court. For purposes of this paragraph 15 only, the potential claim of any member of the classes requesting exclusion shall in the absence of proof to the contrary (aided by such discovery as the Court authorizes) be deemed to be:

(a) In the case of any person who filed a claim in the reorganization proceedings, 10% of any Class C claim so filed which was based upon ownership of debt securities of America, Franchise, Overseas, Equity or

FSN, and 100% of any Class G claim so filed in such proceedings;

(b) In the case of any person who did not file a claim in the reorganization proceedings, the difference between his total acquisition cost for securities of America, Franchise, Overseas, Equity or FSN acquired during the period from May 9, 1968 to July 22, 1970, and the total amount realized by him on disposition thereof, as shown in his Request To Be Excluded From Class; and

(c) In any case where the amount of the potential claim cannot be determined as provided above, and in the absence of proof to the contrary, zero.

16. In the event cash contributions aggregating $8,475,000 are not received by the Escrow Agent within the 10 days and in the manner specified by paragraph 12 hereof, any defendant or defendants shall have the right to contribute the shortage, whether the same is a deficiency

[807]

or a default, within 10 days thereafter. If such shortage occurs by reason of a default, the Court may impose upon the defaulter such sanctions as it may deem appropriate, including the taxation of costs of the notice to the classes and counsel fees. In the event that any such default is timely cured by another defendant or defendants, the Court may enter judgment for the defendant or defendants making good the shortage against any defaulter in the amount of the default, may grant such other relief as the Court deems appropriate, and may also impose any sanctions it deems appropriate. In the event such shortage is not timely made good, then either the Trustee, by his counsel, or any counsel now of record for the named plaintiffs in these class actions shall have the right, exercisable, however, only within the 14 days thereafter, to withdraw from and terminate the proposed settlement. In the event that

such right to withdraw and terminate is not timely exercised, then judgment against any defaulter in favor of the classes and the Trustee (in proportion to their respective interests) shall be entered forthwith for the amount of the default and the Court may grant such other relief as may be just and proper and impose such sanctions, including costs and attorney's fees, as it deems appropriate.

17. Any right to withdraw from and terminate the proposed settlement conferred by any of the preceding three paragraphs may be exercised only by filing written notice with the Clerk of this Court, and mailing a copy thereof to Senior United States District Judge Roszel C. Thomsen, the Trustee's counsel, and each counsel of record in M.D.L. Docket No. 55.

18. Subject to the provisions of paragraph 20 hereof, all consenting defendants as a part of this

[808]

proposed settlement waive all their claims of every kind and description, if any they have, against all debtor estates in the reorganization proceedings or their Trustees or attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates, including but not limited to claims for reimbursement, indemnification, contribution, and other litigation expenses.

19. The consenting defendants expressly reserve all rights, claims and causes of action, including cross-claims and claims for contribution and indemnity, if any, which they may have against any persons whomsoever, including any other consenting defendants (other than the debtor estates in the reorganizaton proceedings, the Trustee, their attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates) which relate to, or arise out of or in connection with, the State of Ohio's loan of $4,000,000 to America, any act or omission with respect to such loan, the litigation relating thereto, and claims,

cross-claims and third-party claims asserted in *State of Ohio* v. *Crofters, Incorporated, et al.*, Civ-72-81 (United States District Court for the Southern District of Ohio), *Shual* v. *Crofters, Incorporated, et al.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas), and *State of Ohio* v. *John D. Herbert, et al.*, 72 CV-03-792 (Franklin County, Ohio, Court of Common Pleas). Subject to the provisions of paragraph 20 hereof, and except as otherwise expressly provided in this Order and exhibits annexed hereto, all consenting defendants hereby release and discharge each and every other consenting defendant, and such other consenting defendant's partners, officers, directors, agents, attorneys and employees,

[809]

past or present, from any and all other claims by or between or among them, of whatsoever kind or nature, and which arise out of or are related to the subject matter of the settled claims or which relate to or arise out of any transactions between any consenting defendants in any of the securities or commercial paper of any of the Four Seasons companies, whether the same might be asserted as an original claim, cross-claim, counterclaim, claim for contribution or indemnification, or otherwise.

If William Tomasello fails to exercise the right to be excluded from the classes pursuant to paragraph 8 of this Order then the consent of Frank Crimmins shall have full force and effect as the consent of any other consenting defendant. Otherwise the consent of Frank Crimmins shall have full force and effect as the consent of any other consenting defendant, except that all rights of any kind, including cross-claims and counterclaims, if any, which arise or may arise out of the claims in the action of *Tomasello* v. *Walston*, as between any and all consenting defendants shall not be released by Frank Crimmins or such consenting defendants and, in the event that Crimmins cross-claims

against Jack L. Clark, Estate of Amos D. Bouse, Deceased, or Tom J. Gray, respectively, in *Tomasello* v. *Walston*, all releases between Frank Crimmins and Jack L. Clark, Estate of Amos D. Bouse, Deceased and Frank Crimmins, or Frank Crimmins and Tom J. Gray, respectively, shall be null and void.

20. Except as herein expressly provided, if for any reason this litigation is not settled in accordance with the terms hereof, then any and all agreements, oral or written, documents, consents, and releases relating to the proposed settlement shall be null and void and of no effect, and neither such writings nor the fact of this proposal nor, except as herein expressly provided, this Order may be used in any way either in subsequent proceedings in this litigation or elsewhere.

21. The Court reserves jurisdiction to adjourn from time to time and place to place the hearing prescribed hereby, and modify the Plan of Distribution, notice and claims procedures contemplated hereby, all without further notice to members of the classes.

22. The Court, without further notice to members of the classes, may in open court, upon not less than 72 hours' notice by phone to or a waiver of notice by all consenting parties and the Trustee, and provided there be no objection from any consenting party or the Trustee made on the return date, change to another date or time any date or time fixed in this Order.

Dated: September 21, 1972.

s/ Roszel C. Thomsen
Senior United States District Judge

Filed September 27, 1972

NOTE

The following Exhibits to the foregoing Order are not reproduced here:

Exhibit A — Joint Application for Authority to Compromise Controversy and Exhibits Thereto, Dated September, 1972

Exhibit C — Class Action Notice

Exhibit D-1 — Proof of Claim Form A

Exhibit D-2 — Proof of Claim Form B

Exhibit E — Form for Requesting Exclusion from Classes

Exhibit F — Escrow Agreement

Exhibit G — Certificates of Consent

EXHIBIT B TO THE ORDER DEFINING CLASSES, TENTATIVELY APPROVING SETTLEMENT, ETC.

[834]
[Exhibit B]

PLAN FOR DISTRIBUTION OF THE CLASS SETTLEMENT FUND

Introduction

The Plan for Distribution (herein the "Plan") contains the recommendations of counsel of record for the con-

senting plaintiffs[1] with respect to distribution to members of the classes of certain moneys herein referred to as "the Residual Class Settlement Fund", *viz.*, that portion of the Class Settlement Fund, including a portion of the interest earned thereon, remaining after deduction therefrom of Court costs, the expenses of administration and distribution of the proposed settlement, and such legal fees and disbursements as may be allowed by the Court to class plaintiffs and their attorneys. The consenting parties have agreed that the Plan shall be subject to approval by the Court (after the Notice to members of the classes provided by the Order) and such modification thereof as the Court may determine (without further notice to members of the classes).

THE PLAN

Members of the classes who do not timely request exclusion shall be required to complete and file a Proof of Claim form as prescribed by the Order, on or before January 3, 1973, or shall be barred from participation in the Residual Class Settlement Fund unless the Court shall, by order, extend the time for filing said Proof of Claim. The amount of each claim shall be computed and determined in accordance with the instructions and limitations contained in the form prescribed by the Court. Such forms contemplate, for purposes of this Plan of Distribution only:

[835]

(a) The incorporation by reference, if a claimant so elects, of the Class "G" claim heretofore filed by him in the reorganization proceedings;

(b) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America,

[1] Unless the context otherwise requires, all terms defined in the Order to which this Plan is an exhibit shall have the same meanings as set out therein.

Franchise, Overseas, Equity and FSN, any profits realized thereon;

(c) Any Class "C" creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

(d) All equity securities heretofore issued by America, Franchise, Overseas, Equity and FSN shall be deemed to have no value; and

(e) No claim for interest shall be allowed.

Each member of the classes who submits such a Proof of Claim is herein referred to as a "Claimant", and by filing such Proof of Claim submits to the jurisdiction of the Court and agrees to supply such information and testimony as the Court, the Trustee (charged by the Order with preliminary processing of the claims of the class members) or such other person as may hereafter be designated by the Court to process or approve claims, may require.

Following preliminary processing of claims of members of the classes by the Trustee (which may include a request for additional information and evidence, the correction of mathematical computations, and the disallowance, subject to Court order, of claims which appear on their face to be incorrect or improper), the Trustee shall, as promptly as practicable, file a report with the Clerk of this Court, Senior United States District Judge Roszel C. Thomsen, and each of the present counsel of record for the named plaintiffs in these class actions.

[836]

Said report shall list all claims and shall contain the recommendations of the Trustee with respect to the claims

which appear due to be allowed, disallowed, or further processed.

Within thirty days thereafter, present counsel of record for the named plaintiffs in these class actions may submit their objections, if any, to claims, and their recommendations, if any, with respect to the allowance, disallowance and further processing of claims.

The Court shall have jurisdiction to allow or disallow in whole or in part any claim filed, determine any disputes with regard thereto, and approve any compromise thereof, and may appoint a special master or masters, if necessary; however, present counsel of record to the consenting plaintiffs have recommended to the Court that no such appointment be made until the recommendations of the Trustee and plaintiffs' counsel are submitted and then only if the necessity therefor appears.

The Court shall thereupon enter final judgment with respect to the allowance and disallowance of claims and the entitlement of Claimants to participate in the Residual Class Settlement Fund.

After such final judgment shall be no longer subject to appellate review, the Residual Class Settlement Fund shall be distributed to Claimants whose claims are finally approved by the Court in the proportion that each such Claimant's finally approved claim bears to the aggregate of all finally approved claims filed herein.

Notice to Persons Who Between May 9, 1968 and July 22, 1970, Inclusive, Purchased or Acquired Securities or Commercial Paper Issued by Four Seasons Nursing Centers of America, Inc., Four Seasons Franchise Centers, Inc., Four Seasons Overseas, N. V., Four Seasons Equity Corporation, or FSN Corporation

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	**M.D.L. DOCKET**
FOUR SEASONS SECURITIES LAWS	**NO. 55**
LITIGATION	**All Cases**

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and an Order of the United States District Court for the Western District of Oklahoma (the "Court") entered herein on the 21st day of September, 1972 (the "Order"),

YOU ARE HEREBY NOTIFIED:

Your rights may be affected by certain class actions hereinafter described now pending in this Court, and a proposed settlement thereof; a hearing on the proposed settlement will be held in the United States Courthouse, Oklahoma City, Oklahoma, commencing at 10:00 A.M. on the 16th day of November, 1972; the 1st day of November, 1972 is the last day for electing to be excluded from the classes in the class actions described herein; the 1st day of November, 1972 is the last day for filing of appearances and objections in the class actions to the proposed settlement and to the entry of certain orders in connection therewith; the 3rd day of January, 1973 is the bar date set by the Court for filing claims in the class actions pursuant to the proposed settlement; any such date may be extended without further notice by order of the Court; and the Court has established procedures described herein which must be followed by claimants, objectors, and persons wishing to be excluded from the classes in the class actions.

[838]

1. There are pending in this Court certain actions for damages ("the lawsuits") for alleged violations of the federal securities laws and state law in connection with purchases and sales of securities of Four Seasons Nursing Centers of America, Inc. ("America"), Four Seasons Franchise Centers, Inc. ("Franchise"), Four Seasons Overseas, N.V. ("Overseas"), Four Seasons Equity Corporation ("Equity"), and FSN Corporation ("FSN"), sometimes collectively referred to as the "Four Seasons companies." The Court has conditionally ordered for purposes effectuating the proposed settlement subject to further order of the Court, that five of those lawsuits may be maintained by the plaintiffs therein as class actions on behalf of the classes defined below, namely:

(a) All persons (other than the Four Seasons com-

panies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970 both inclusive purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiares and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

The five lawsuits ("the class actions") are Civil Action No. 70-375, Civil Action No. 71-349, Civil Action No. 71-354, Civil Action No. 71-582, and Civil Action No. 71-353. The defendants in one or more of the class actions include the officers, directors and auditors of America and Equity during all or part of the period concerned, the managing underwriter of two public offerings of America stock and of one public offering of Equity stock, and certain others.

[839]

Claims approximating $110,000,000 have been filed in the reorganization proceedings of the Four Seasons companies by Class G claimants, as designated in the Plan of Reorganization for those companies, by persons who may be within the classes above described.

2. The complaints and statements of position in the class actions allege, in brief summary, that defendants vio-

lated, among other laws, the Federal Securities Act of 1933, §§ 5, 11, 12 and 17, and the Federal Securities and Exchange Act of 1934, §§ 9 and 10(b), in that:

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies.

3. For more information with respect to the scope and extent of the claims asserted in the class actions, it is necessary to examine the complaints, statements of position and other documents which are on file with the Court. Reference can also be made to *In Re Four Seasons Securities Laws Litigation*, 328 F. Supp. 221 (1971).

4. The defendants deny the charging averments of the various complaints and deny all wrongdoing, and further deny that members of the classes are entitled to any damages or other relief.

[840]

THE SETTLEMENT

5. The Court has conditionally approved, for submis-

sion to members of the classes, a proposed settlement of the class actions, in conjunction with and dependent upon a settlement of four plenary actions, Civil Actions Nos. 72-449, 72-450, 72-90 and 72-210 ("the Trustee actions"), instituted by James R. Tolbert, III, Reorganization Trustee ("the Trustee"), appointed by the Bankruptcy Court in the reorganization proceedings of the Four Seasons companies (BK Nos. 70-1008, 70-1008-A, 70-1008-B, 70-1008-C, 70-1008-D, 70-1129 and 70-1129-A), all pending in this District, upon terms and conditions more fully set out in the Order, to which reference is made for a fuller statement thereof.

6. In consideration of the dismissal of the class actions and the Trustee actions, and the claims asserted therein, certain of the defendants or persons on their behalf have, among other things, severally agreed to contribute various amounts towards the settlement aggregating $8,500,000 in cash, and to release or procure the release of certain claims aggregating an amount in excess of $1,000,000 heretofore filed against the debtor estates in the reorganization proceedings.

7. In addition, Walston & Co., Inc. ("Walston") has also agreed to release and discharge such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston, but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity.

[841]

8. Of the $8,500,000 proposed Settlement Fund, the sum of $7,000,000 will be used to create a Class Settlement Fund for distribution, together with a portion of the interest thereon, to members of the classes whose claims are allowed by the Court, after deduction therefrom of Court costs, the expenses of administration and distribution of the proposed settlement, and such legal fees and disbursements

as may be allowed by the Court to class plaintiffs and their attorneys.

9. $1,500,000 of the proposed Settlement Fund, and the release of the claims against the debtor estates referred to in paragraph 6 above, are to be contributed by the defendants in settlement of the Trustee actions, and will enure to the benefit of the debtor estates, the reorganized company, and all persons receiving stock of the reorganized company pursuant to the Plan of Reorganization.

10. Plaintiffs' counsel in these class actions and the Trustee have advised the Court, and this Court has determined, that the proposed settlement, if consummated, will materially expedite the termination of the reorganization proceedings and will enhance the value of shares of the reorganized company to be distributed pursuant to the Plan of Reorganization.

11. The proposed settlement is subject to certain contingencies set forth in the Order, including, among other things, Court approvals of the settlement after notice and hearing. In the event persons requesting exclusion from the classes have potential claims aggregating $4,000,000 or more, any consenting defendant may elect to withdraw from and terminate the proposed settlement.

[842]

12. *DISTRIBUTION OF CLASS SETTLEMENT FUND*

The Court has conditionally approved, and will on November 16, 1972, hear any objections to, a proposed Plan for Distribution of the Class Settlement Fund which contemplates that:

(a) Distributions will be made to claimants whose claims are allowed by the Court, in the proportion that the allowed claim bears to the aggregate of all allowed claims;

(b) Any Class "G" claim heretofore filed in the

reorganization proceedings by any member of the classes may, if the claimant so elects, be incorporated by reference in these proceedings;

(c) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America, Franchise, Overseas, Equity and FSN, any profits realized thereon;

(d) Any Class C creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

(e) All equity securities heretofore issued by America, Franchise, Overseas, Equity or FSN shall be deemed to have no value; and

(f) No claim for interest shall be allowed.

13. *FILING PROOF OF CLAIM*

Every member of either class who does not duly and timely request exclusion must complete one of the two Proof of Claim forms enclosed with the mailed notice (Form A or Form B), and should mail it to:

James R. Tolbert, III, Trustee
P. O. Box
Oklahoma City, Oklahoma 73216

[843]

If you have not filed a proof of claim as a Class "G" claimant in the Four Seasons reorganization proceedings, you should file Proof of Claim Form B. If you have filed a proof

of claim as a Class "G" claimant in the Four Seasons reorganization proceedings then you may elect, instead of providing all of the information required by Proof of Claim Form B, to incorporate by reference in these proceedings the information contained in the proof of claim previously filed by you, by appropriately marking the box indicated for such elections on Proof of Claim Form A, or, if you prefer, you may fill out and file Proof of Claim Form B.

WARNING: The Court Order provides that the completed claim form must be received not later than January 3, 1973. Claims which are not timely filed may be disallowed, in which event the claimant will receive no distribution from the Class Settlement Fund.

14. The Court will exclude you from the class or classes in the class actions if on or prior to the 1st day of November, 1972, you file with the Clerk, United States District Court for the Western District of Oklahoma, United States Courthouse, Oklahoma City, Oklahoma 73102, a written request for exclusion from these classes. In the event you choose to be excluded, the Court requests that you do so on a form which you may obtain upon written request addressed to James R. Tolbert, III, Trustee, P.O. Box , Oklahoma City, Oklahoma 73126. If you elect to be excluded from the class or classes, you will be free to pursue on your own behalf whatever legal rights you may have, except that you may not institute or participate in a class action against any person whomsoever asserting or relating to any of the settled claims as defined in the Order. Any person requesting exclusion will not be entitled to file a claim against, or participate in any distribution from the Class Settlement Fund.

[844]

Moreover, any individual suit hereafter instituted by a person requesting exclusion may be barred, in whole or in part, by applicable statutes of limitation.

15. The fact that you are presently a party in any action involving the securities of America, Equity, Franchise, Overseas or FSN does *not* relieve you of the obligation of requesting exclusion if you do not wish to be bound by any order or judgment or by the proposed settlement. If you are a named party in any such actions you should consult your attorney concerning this Notice.

16. If you do not request exclusion from the class or classes in the manner and within the time described above:

(a) You will be included in such class or classes and any order or judgment of the Court in the class actions, whether favorable or not, in connection with the proposed settlement proceedings will be binding upon you;

(b) You may, if you desire, enter an appearance in the class actions through counsel of your choosing, provided that such appearance is entered no later than November 1, 1972. Otherwise, the named plaintiffs in the class actions and their counsel will be deemed to represent your interests as a member of the appropriate class or classes.

17. A hearing will be held on November 16, 1972 at 10:00 A.M., United States Courthouse, Oklahoma City, Oklahoma, with respect to whether the Court shall finally approve the proposed settlement, the proposed Plan for Distribution of the Class Settlement Fund, the allowance of legal fees and disbursements to class plaintiffs' counsel, and certain other matters relating to the proposed settlement, at which time any person affected by the Order may be heard; provided, however, that no objector to the settlement will be heard and no papers or briefs submitted by or on behalf of any such objector will be received or considered by the Court at or in connection with such hearing unless, on or before November 1, 1972, notice of intention to appear and copies of all such papers and briefs are filed

with the Clerk of this Court and are served upon each of:

[845]

Thomas W. Kelly, Esq.
Breed, Abbott & Morgan
1 Chase Manhattan Plaza
New York, New York 10005

Charles W. Boand, Esq.
Wilson & McIvaine
135 South LaSalle Street
Chicago, Illinois 60603

Arthur F. Mathews, Esq.
Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006

counsel for certain defendants,

and each of:

Marvin Cherner, Esq.
516 Brown-Marx Building
Birmingham, Alabama 35203

Ira Jay Sands, Esq. and Robert B. Levin, Esq.
701 Seventh Avenue
New York, New York 10036

J. Vernon Patrick, Esq.
Berkowitz, Lefkovits & Patrick
1400 City National Bank Building
Birmingham, Alabama 35203

Harry A. Young, Jr., Esq.
Neistein, Richman, Hauslinger & Young, Ltd.
33 North LaSalle Street
Chicago, Illinois 60602

counsel for named plaintiffs in the class actions, and:

Robert C. Bailey, Esq.
600 Hightower Building
Oklahoma City, Oklahoma 73102

The Court may modify the Plan for Distribution of the Class Settlement Fund, claims procedures contemplated by the Order and this Notice, and change to another date or time or date fixed in the Order or set forth herein, without further notice to members of the classes.

[846]

18. The complete Court file in the class actions, including transcripts of hearings and testimony, documentary exhibits, statements of position, briefs and pleadings, may be examined and copied at any time during regular office hours at the office of the Clerk of the United States District Court for the Western District of Oklahoma, United States Courthouse, Oklahoma City, Oklahoma; provided, however, that those portions of the Court files subject to protective orders may be examined only in conformity with and subject to the terms of such protective orders.

19. Any question which any person to whom this notice is addressed may have with respect thereto or with respect to the Proof of Claim form should be raised with his own attorney or his advisers, or directed to counsel for named plaintiffs in the class actions (see paragraph 17 of this Notice), and not to this Court.

Dated: September 21, 1972.

s/ Roszel C. Thomsen
t/ Roszel C. Thomsen
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION
(M.D.L. DOCKET NO. 55)

[1094]

FINAL JUDGMENT APPROVING SETTLEMENT AND PLAN OF DISTRIBUTION AND DISMISSING CLAIMS WITH PREJUDICE

This matter came on for hearing on November 16, 1972, pursuant to the order entered herein on September 21, 1972, (hereinafter called the "Order") for the purpose of determining whether the proposed settlement as defined by the terms and conditions of the Order and the exhibits thereto should be approved finally, whether the Plan of Distribution annexed to the Order as Exhibit B should be approved finally, whether a final judgment approving the proposed settlement and Plan of Distribution should be entered as

contemplated by the Order, and whether the other actions contemplated by the Order should be taken, and for the purpose of considering applications for fees and allowances in connection with the proposed settlement.

The terms used herein, which were defined in the Order, shall have the same meaning as such terms had in the Order. The Court has reviewed the terms and conditions of the proposed settlement and the court file, including transcripts of pretrial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and extensive briefs filed prior to the entry of the Order (all of which are deemed by the Court to be

[1095]

material to a determination of the fairness, reasonableness, equity and adequacy of the proposed settlement and which are hereby made a part of the record of the hearing upon the proposed settlement), the objections to the proposed settlement filed by Edward I. Cohen, Esq., on behalf of himself and others, and the evidence, memoranda, briefs and arguments of counsel at this hearing, and has been fully advised in the premises.

The Court finds and determines that:

1. The consenting defendants advanced the sum of $25,000 to the Trustee in accordance with paragraph 7 of the Order, to be used by the Trustee for giving of notice and claims processing that is contemplated by the Order and this judgment. Such payment of $25,000 is to be credited against the contributions required to be made by the consenting defendants to the Class Settlement Fund.

2. James R. Tolbert, III, the duly appointed, qualified and acting Trustee of America, Franchise, Overseas, Equity and FSN, acting pursuant to and in accordance with the Order, mailed notice in substantially the same form as Ex-

hibit C to the Order and proof of claim forms in substantially the same form as Exhibits D-1 and D-2 to the Order to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, at such member's last known address, on or before October 2, 1972, and caused said notice in substantially the same form as Exhibit C to the Order to be published on October 6, 1972, in the Southwestern, Eastern, Midwestern and Western editions of the *Wall Street Journal*, except that, on October 6, 1972, the notice was not published in the following states: Florida, Alabama,

[1096]

Georgia, Missouri, Kansas, Ohio, the Southern portion of Illinois and two-thirds of the State of Kentucky; and the cities of Buffalo, New York, Baltimore, Maryland, Detroit, Michigan, and Washington, D. C., and on October 9, 1972, in the Eastern and Midwestern editions of the *Wall Street Journal*. The foregoing resulted in the notice being published in all editions of the *Wall Street Journal*. The Trustee mailed in excess of 28,000 copies of the notice and claim forms to members of the classes whose identities and addresses were known to him or whose names were furnished to him by any of the parties, at their last known addresses, to securities brokers and to others. Proof of such mailing and publication was filed in this Court in accordance with the terms of the Order. The notice given as aforesaid constituted substantial compliance with the Order and satisfied in all respects requirements of law, including the Constitution of the United States and subdivisions (c) (2) and (e) of Rule 23 of the Federal Rules of Civil Procedure.

3. At the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the securities or commercial paper of the Four Seasons companies, the Trustee timely served by registered mail a copy of the Order and its exhibits, in-

cluding the notice annexed thereto, upon all named plaintiffs in the following actions:

Mollie Nussbacher v. *J. C. Andrews, et al.*, Civil Action No. 71-351 (W.D. Okla., MDL Docket No. 55);

M. G. Development Co. v. *Kohlmeyer*, Civil Action No. 71-355 (W.D. Okla., MDL Docket No. 55);

William Tomasello v. *Walston & Co., Inc.*, Civil Action No. 71-560 (W.D. Okla., MDL Docket No. 55);

Henry L. Schoger v. *Walston & Co., Inc. et al.*, Civil Action No. 71-568 (W.D. Okla., MDL Docket No. 55);

[1097]

Bertha Moss v. *Walston & Co., Inc.*, Civil Action No. 72 C 1726 (N.D. Ill. 1972);

Alf Garnaas v. *Bache & Co, Inc.*, Civil Action No. 4-71-649 (D. Minn. 1971);

Ann G. Olson v. *Walston & Co., Inc.*, Civil Action No. 71-699 (W.D. Okla., MDL Docket No. 55);

Elmer Block v. *Walston & Co., Inc.*, Civil Action No. 72-153 (W.D. Okla., MDL Docket No. 55);

Loren Schweninger v. *Walston & Co., Inc., et al.*, Civil Action No. 72-449 (W.D. Okla., MDL Docket No. 55);

Florence P. Hamilton v. *Walston & Co., Inc., et al.*, Civil Action No. 72-765 (W. D. Okla., MDL Docket No. 55);

Seymour Goeld, et ux. v. *Walston & Co., Inc., et al.*, Civil Action No. 72-811 (W. D. Okla., MDL Docket No. 55);

Jean Sitarski v. *Walston & Co., Inc., et al.*, Civil Action No. 72-812 (W. D. Okla., MDL Docket No. 55);

Thomas M. Dowling v. *Walston & Co., Inc.*, No. 7298-1972 (New York State Supreme Court, County of Kings);

Frederick Copeland v. *Walston & Co., Inc.*, No. 72-1664 (Circuit Court of the State of Oregon, Lane County);

Vincent Micel v. *Walston & Co., Inc.*, (Commonwealth of Massachusetts, Suffolk Supreme Court, 666640, remanded to Boston Municipal Court, T-27784);

State of Ohio v. *Crofters, Inc., et al.*, CIV-72-81 (United States District Court for the Southern District of Ohio);

Shaul v. *Crofters, Inc., et al.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas);

and upon third-party plaintiffs in an action entitled:

State of Ohio v. *John D. Herbert, et al.*, 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas).

4. The Trustee has preserved the responses to the notice, including all proofs of claim received to date, and has made them available to all parties and to members of the classes for inspection and copying. The Trustee forwarded all inquiries from members of the classes and others to plaintiffs' counsel for reply.

[1098]

5. January 3, 1973, is the bar date for filing claims in the class actions. On or before November 9, 1972, approximately 2,539 proofs of claim had been received by James R. Tolbert, III, Trustee, representing claims (which had not yet been processed by the Trustee) aggregating approximately $22,565,264.

6. The Trustee mailed forms for requesting exclusion from the classes in the form of Exhibit E to the Order to

each person who requested them on or prior to November 1, 1972.

7. Twelve written requests for exclusion from the classes, most of which were substantially in the form of Exhibit E to the Order and some of which were in the form of letters and telegrams, were filed by or on behalf of the persons listed in Exhibit A hereto with the Clerk of this Court on or before November 1, 1972. Such persons appear to have aggregate potential claims of approximately $500,000.00, and have effectively exercised their right to be excluded from the classes. No other requests for exclusion from the classes, either in the form of Exhibit E or otherwise, have been filed with the Clerk of the Court either on or before November 1, 1972, or at any time thereafter through November 15, 1972; however, the counsel for Bank of America, as Trustee of Transport Indemnity Company and Transport Underwriters Association Employee Profit Sharing and Retirement Plan PS-13901 (hereinafter called "Bank of America"), which filed a Class G claim of $268,877.62 in the reorganization proceedings, wrote a letter, dated November 15, 1972, which was received by the Trustee on November 17, 1972, enclosing Proof of Claim Form A containing a modified form of release and stating that the Bank of America would "consider itself excluded from the class or classes" if its Proof of Claim Form with the modified form of release was rejected.

[1099]

8. No one has withdrawn from and terminated the settlement or extended the time to exercise such right as permitted by the Order.

9. All conditions of the proposed settlement set forth in the Order have been met or have been waived except to the extent provided for in paragraph 16 of the Order and paragraphs F, G and Q of this final judgment.

10. On November 16 and 17, 1972, a hearing was held before this Court in accordance with the Order. No persons appeared at the hearing and objected to the proposed settlement other than Edward I. Cohen, Esq., representing himself, Michael D. Cohen, Concetta and Joseph Di Pietro, S. Mark Fine, Lawrence Goldwasser, Frank Riccio, and Mary Louise Sullivan, persons claiming to be members of the classes, none of whom have requested exclusion from the classes, and who appear to have aggregate claims, computed in accordance with Exhibit E to the Order, of approximately $300,000.00. No other member of either of the classes objected to the proposed settlement at or prior to the hearing, either orally or in writing, but one person who was a selling shareholder in the November 26, 1968 public offering of Four Seasons Nursing Centers of America, Inc., and who filed no claim in the reorganization proceedings, objected to the proposed settlement without stating any reason for his objection. At the hearing the evidence offered in support of the proposed settlement included the entire court file and record in these proceedings, encompassing the transcripts of pre-trial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and briefs; an affidavit of mailing and publication of notices by the Trustee; a copy of the Second Amended Plan of Reorganization (Restated); a copy of a "Joint Application for Authority to Compromise Controversy" in the reorganization proceedings; two stipulations regarding an appeal from the reorganization proceedings by Charles O.

[1100]

Finley, et al; the "Advisory Report of the Securities and Exchange Commission on Proposed Plan of Reorganization;" a certified copy of the order in the reorganization proceedings approving the Second Amended Plan of Reorganization (Restated); a certified copy of the order in the

reorganization proceedings confirming the Second Amended Plan of Reorganization (Restated); the order and opinion of the Court in the reorganization proceedings approving the compromise of the Class G claims; an affidavit of James R. Tolbert, III, Trustee, and supporting exhibits with respect to claims filed in these proceedings, requests for exclusion from the classes, and related matters; a letter from George Cabell, General Counsel, Walston & Co., Inc., to Ira Jay Sands, dated October 19, 1972, regarding debit balances in Walston customer accounts which are being forgiven; a letter from Donald Welsh, on behalf of A. W. Jones, A. W. Jones Associates, and Hedged Investors; a letter from Harry A. Young, Jr., Esq., regarding requests for exclusion from the classes; separate replies by Walston & Co., Inc. and Frank Crimmins to a report of investigation by the American Stock Exchange; and the Verified Response filed by J. Vernon Patrick, Jr. and Marvin Cherner, for the Purpose of Correcting Certain Errors and Misconceptions which Appear in the Memorandum filed by Objector Cohen, dated November 14, 1972, all of which were received in evidence without objection. Counsel for the Trustee represented to the Court that the Trustee supported and recommended approval of the proposed settlement and stated that the Securities and Exchange Commission had advised him that it would appear on November 21, 1972 at the hearing on the Joint Application for Authority to Compromise Controversy in the reorganization proceedings and that it would announce that it had no objection to such proposed settlement.

[1101]

The Court admitted into evidence all evidence offered and not withdrawn voluntarily by counsel for objectors, including a report of investigation by the American Stock Exchange. Counsel for objectors voluntarily withdrew an affidavit in support of his Motion to Oppose The Approval of The Proposed Settlement which had been submitted to

the Court in a sealed envelope and which was returned unopened to counsel for objectors.

11. On October 31, 1972, the Trustee filed in the reorganization proceedings a "Joint Application for Authority to Compromise Controversy" signed by the Trustee, James R. Tolbert, III, the defendants in the Trustee actions, certain other parties to the reorganization proceedings, and the named plaintiffs in these class actions and their counsel, which Joint Application was in the form of Exhibit A to the Order.

12. All of the findings and determinations made in the Order, whether conditional, *prima facie* or absolute, are confirmed and made absolute, unconditional and final.

13. For reasons stated in an opinion to be filed:

A. The proposed settlement is fair, reasonable, equitable, in the best interests of the classes, and adequate and should be approved;

B. The Plan of Distribution, including the administrative provisions thereof, is fair, reasonable, equitable, in the best interests of the classes, and adequate and should be approved; and

C. The objections to the proposed settlement and the Plan of Distribution should be overruled and disallowed.

[1102]

14. By consent of all parties, paragraph I(c) (2) of the Escrow Agreement (Exhibit F to the Order) and all references thereto are to be deleted from the Escrow Agreement to be executed and delivered in implementing the proposed settlement.

15. The proposed settlement, the Order, and this final judgment are not and shall not be construed as an admission by defendants or any of them that any of the claims

asserted state a cause of action against any defendant, of the validity of any claims asserted in any of the actions or of the liability of any defendant therein or of any wrongdoing by any of them or of any violation of law by any of them, or of any deficiencies or misstatements in any of the registration statements, financial statements or other documents involved, nor are they a concession nor shall they be used as any admission of any fault or omission in any oral or written statement or document or financial report heretofore issued, filed, made, reviewed, or authorized by any defendant. Neither the proposed settlement, the Order or this final judgment, nor any paper related to any one or more of them, nor any of the terms of any of them, shall be offered in evidence in any civil, criminal or administrative action or proceedings as an admission of wrongdoing on the part of any defendant, or as an admission by any plaintiff that the consideration to be given hereunder represents the maximum amount which could be recovered. Defendants have denied, and they continue to deny the charging averments in all of the complaints, including the averments that any plaintiff suffered any monetary damage.

[1103]

16. This Court hereby expressly determines that there is no just reason for delay in the entry of this final judgment and accordingly directs that this final judgment be entered as, and be deemed, a final judgment in accordance with Rule 54(b), of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

A. The proposed settlement is hereby finally approved and confirmed as being fair, reasonable, equitable and adequate, and the parties thereto are directed to perform all acts required by the proposed settlement in accordance with the terms of the Order and this final judgment.

B. The Plan of Distribution, including the administrative provisions thereof, is hereby approved and confirmed as being fair, reasonable, equitable and adequate.

C. The objections to the proposed settlement are overruled and disallowed.

D. Paragraph I(c)(2) of the Escrow Agreement (Exhibit F to the Order) and all references thereto are to be deleted from the Escrow Agreement to be executed and delivered in implementing the proposed settlement.

E. Counsel for the plaintiffs in the class actions, on behalf of the class members, and all consenting defendants, are directed promptly to enter into the Escrow Agreement, in the form attached to the Order as Exhibit F, as modified by paragraph D hereof, with The Liberty National Bank and Trust Company of Oklahoma City, as Escrow Agent, and all parties hereto and the Escrow Agent are directed to comply with the terms of the Escrow Agreement.

[1104]

F. The consenting defendants and the insurors, who have filed commitments to make cash contributions on behalf of certain consenting defendants, are severally directed to make the cash contributions to the Settlement Fund in accordance with their respective signed commitments to contribute cash aggregating $8,475,000, filed under seal with Senior U. S. District Judge Roszel C. Thomsen contemporaneously with the entry of the Order, with certified or cashier's checks payable in Chicago, New York City or Oklahoma City funds delivered to the Escrow Agent in Oklahoma City in accordance with the Escrow Agreement not later than 10 days after the entry of this final judgment. In the event these contributions aggregating $8,475,000 are not received by the Escrow Agent within the ten (10) days and in the manner specified herein, the provisions of paragraph 16 of the Order shall be applicable.

G. Walston is directed, promptly after this final judgment becomes nonreviewable and unappealable, to release and discharge all such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston but only so far and to the extent that such debt exists by reason of the purchase by such customer from or through Walston of securities of America or Equity.

H. The persons listed in Exhibit A hereto are excluded from the classes and are permanently enjoined and barred from instituting, maintaining or participating in any class action asserting or relating to any or all of the settled claims against any person whomsoever.

[1105]

I. Each and all of the class actions (Civil Actions Nos. 70-375, 71-349, 71-354, 71-582 and 71-353) and all settled claims are dismissed without costs, with prejudice and on the merits, as to all members of the classes, and each member of either or both of the classes is forever barred from the prosecution against the defendants in the class actions or anyone else of any and all settled claims.*

J. All of the actions in M.D.L. Docket No. 55, including the following, are dismissed without costs, with prejudice and on the merits as to all plaintiffs therein in each of said actions:

Matthew D. Margoles, etc. v. *Four Seasons Nursing Centers of America, Inc., et al.*, Civil Action No. 71-348;

Lowell S. Fink, etc. v. *Gordon H. McCollum, et al.*, Civil Action No. 71-349;

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* The statement that the class actions listed herein are dismissed "on the merits" does not mean that such dismissals may be pleaded by any defendant as *res judicata* or collateral estoppel in any individual action (as distinguished from a class action) now maintained or which may be maintained by any person listed on Exhibit A hereto.

Henry J. Lebens, etc. v. *Walston & Co., Inc., et al.*, Civil Action No. 71-350;

Mollie Nussbacher v. *J. C. Andrews, et al.*, Civil Action No. 71-351;

Franz L. Paul, etc. v. *Jack L. Clark, et al.*, Civil Action No. 71-352;

Lowell S. Fink, etc. v. *John W. Johnston, et al.*, Civil Action No. 71-353;

Edward Ginsberg v. *Four Seasons Nursing Centers of America, Inc., et al.*, Civil Action No. 71-354;

M. G. Development Co. v. *Kohlmeyer & Co., et al.*, Civil Action No. 71-355;

Frank Sher, etc. v. *Jack L. Clark, et al.*, Civil Action No. Civ-70-375;

Orchestra Investment Club, et al. v. *Four Seasons Nursing Centers of America, Inc.*, Civil Action No. 71-356;

Manford H. Fetman, etc. v. *Walston & Co., Inc., et al.*, Civil Action No. 71-582;

[1106]

Henry L. Schoger v. *Walston & Co., Inc., et al.*, Civil Action No. 71-568;

Ann G. Olson v. *Walston & Co., Inc.*, Civil Action No. 71-699;

Elmer Block v. *Walston & Co., Inc.*, Civil Action No. 72-153;

Seymour Goeld, et ux. v. *Walston & Co., Inc.*, Civil Action No. 72-811.

Provided, however, that any individual action maintained by any person listed on Exhibit A hereto is not hereby dismissed.

K. All of the derivative causes of action in all M.D.L. Docket No. 55 cases are dismissed without costs, with prejudice and on the merits.

L. Each member of the classes who claims a right to participate in the Class Settlement Fund shall be required to execute and deliver, as a part of his proof of claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 to the Order, and no proof of claim shall be allowed without a release in such form.

M. The class plaintiffs and their counsel and all consenting defendants shall perform the acts called for by the proposed settlement and shall execute and deliver all further documents and papers as the Court may deem advisable to effectuate and finalize the proposed settlement.

N. The consenting defendants and their counsel, except as in the Order or herein expressly provided, shall have no responsibility or obligation to participate in or perform any acts in furtherance of the performance of the

[1107]

proposed settlement after this judgment and the judgment in the reorganization proceedings, pursuant to Exhibit A to the Order, authorizing and directing dismissal of the Trustee actions are no longer subject to appellate review.

Q. The attorneys of record for plaintiffs in the class actions shall not in any proceeding in M.D.L. Docket No. 55 or in any other proceeding or litigation represent any person (whether a party hereto, a member of either class, one who requested exclusion from the classes or anyone else) who asserts against any defendant or anyone else any claim relating to or arising out of the subject matter of the settled claims.

P. Neither this judgment, nor any paper related to it, nor any of the terms thereof shall be offered or received in evidence in any civil, criminal or administrative action or proceeding as an admission of wrongdoing on the part of any defendant.

Q. Except as herein provided, the proposed settlement and all proceedings in furtherance thereof, including this judgment, shall be null and void in the event that this judgment or any judgment entered in the reorganization proceedings, pursuant to Exhibit A of the Order, authorizing and directing the dismissal of the Trustee actions is vacated or reversed in whole or in part by a decision of an appellate court; provided, however, that the refund provisions of the Escrow Agreement to the extent that they provide for the return of cash contributions to the participating contributors shall be valid and performed.

[1108]

R. Subject to the limitations set forth in paragraph N, hereof, all parties hereto and their respective counsel, the Trustee and the Escrow Agent are directed to continue to comply with the terms of the Order, this judgment, the Plan of Distribution and the Escrow Agreement insofar as the same relate to the processing of proofs of claim. As promptly as practicable after January 3, 1973, the last day for filing proofs of claim by members of the classes, the Trustee is directed to file his report with the Court as provided in the Plan of Distribution and to deliver a copy of such report and all supporting documents to each of the present counsel of record for the named plaintiffs in these class actions. Upon the filing of the report and delivery of the copy and supporting documents, the Trustee is relieved and discharged from any further responsibility under the Order, the Plan of Distribution, and this judgment. At the same time, the Trustee shall serve a final statement for expenses incurred upon the Escrow Agent and each of the

present counsel of record for the named plaintiffs in these class actions. The final statement shall be paid by the Escrow Agent within ten (10) days out of the Class Settlement Fund, unless a timely objection to such statement is filed with the Escrow Agent and with the Court, in which event the Escrow Agent shall await a further order of this Court; provided that such payment shall not be made unless the time for appeal from this final judgment and the judgment pursuant to the Joint Application for Authority to Compromise Controversy shall have expired and no appeal shall have been taken. The Escrow Agreement shall be modified to permit such payment upon satisfaction of the conditions of the preceding sentence. In the event the Escrow Agent does not pay such statement within 30 days from presentment, then and in that event consenting plaintiffs shall pay such statement to the Trustee on demand. In the event the

[1109]

proposed settlement becomes final and unappealable such sums paid to the Trustee by consenting plaintiffs shall be reimbursed to them from the Class Settlement Fund as costs without further order of this Court upon presentment by consenting plaintiffs to the Escrow Agent of their statement for such costs.

S. Harry A. Young, Jr., Esq., counsel for plaintiff Fetman, is hereby appointed plaintiffs' representative for the class in connection with all matters relating to the processing of claims. All matters relating to claims shall be referred to him and he shall coordinate such matters with counsel for other class plaintiffs in such manner as he deems appropriate. In connection therewith he shall be paid from the Class Settlement Fund on an hourly basis to be determined by further order of this Court.

T. The Court shall have and retain jurisdiction with respect to allowance of attorneys' fees and disbursements

to class plaintiffs and their counsel and with respect to all matters relating to the Class Settlement Fund and the Plan of Distribution, including the proof and allowance of claims and decisions of related issues of fact and law and determination of the time, mode and amounts of all payments out of the balance of the Class Settlement Fund, aided in the event the Court deems it necessary by such master or masters as may be appointed. The Court shall also have and retain jurisdiction to determine the effect of the letter, dated November 15, 1972, on behalf of Bank of America referred to above in paragraph 7, and what rights, if any, Bank

[1110]

of America may have as a result thereof, including whether the Bank of America should be deemed to be added to Exhibit A. The provisions of this paragraph T respecting retention of jurisdiction shall not affect the finality of this judgment as to any matters not expressly reserved in this paragraph T.

U. Since an Order on Application to Compromise Controversy substantially in the form included in Exhibit A to the Order, but modified to conform to the stipulations admitted in evidence with respect to the appeals of Charles O. Finley, et al., and in certain respects not material to the proposed settlement, was entered on November 21, 1972, in the reorganization proceedings, this final judgment shall be entered as, and be deemed, a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure and shall be effective immediately.

Entered this 30th day of November, 1972.

s/ Roszel C. Thomsen

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t/ ROSZEL C. THOMSEN
SENIOR UNITED STATES DISTRICT JUDGE

t/ ENTERED IN JUDGMENT DOCKET ON
DEC 4 1972
s/ By: Gladys M. Jones

[1111]
[Exhibit A to Final Judgment]

The following persons have requested exclusion from the classes pursuant to the Order:

William Tomasello; Loren Schweninger; Florence P. Hamilton; Jean Sitarski; Fred A. Copeland and Louise C. Copeland; Richard L. Kaufman; Yolanda C. Baud Brown; Richard E. Dippold; Victor DeRobertis and Valda DeRobertis; Charles N. Fellnagel and Mrs. Dorothy A. Fellnagel; Jerome S. Wittenberg and Corinne B. Wittenberg; A. W. Jones and Co., A. W. Jones Associates, and Hedged Investors.

TABLE OF CONTENTS

Page

TABLE OF CASES AND OTHER AUTHORITIES ii

QUESTION PRESENTED 1

STATEMENT 2

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 16

Summary 16

Preface 17

Point I — The Decision of the Court of Appeals is in Accord with Rule 23 and the Applicable Decisions of the Court 18

Point II — There is no Conflict Between the Decision Below and the Fifth Circuit Decision in *Gonzales v. Cassidy* 25

Point III — The Court of Appeals Recognized That the District Court's Decision Undermined the Administration of Rule 23 27

Point IV — The Notice Procedures Followed by the District Court in this Case are Exemplary 30

Point V — The Tenth Circuit Followed Established Principles of Law in Overturning the District Court's Decision to Grant Ohio Relief Under Rule 60 (b) (6) ... 32

CONCLUSION 37

TABLE OF CASES AND OTHER AUTHORITIES

Cases *Page*

Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971) 32

Ackermann v. *United States*, 340 U.S. 193 (1950) 33

Alphine Pharmacy, Inc. v. *Chas. Pfizer & Co., Inc.*, 69 Civ. 559 (S.D.N.Y. 1970) (unreported) 21, 34

B&B Investment Club v. *Kleinert's, Inc.*, 18 Fed. R. Serv. 2d 746 (E.D. Pa. 1974) 21

Brennan v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) 20, 34

Burstein v. *Slote*, 12 Fed. R. Serv. 2d 577 (S.D.N.Y. 1968) .. 7

Carlisle v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972) 7

Carrethers v. *St. Louis-San Francisco R.R.*, 264 F. Supp. 171 (W.D. Okla. 1967) 33

City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 32

Crane v. *Kerr*, 53 F.R.D. 311 (N.D. Ga. 1971) 33, 34

Dolgow v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971) 7

Eisen v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974) 16, 18, 24

In re Four Seasons Nursing Centers of America, Inc., 329 F. Supp. 647 (W.D. Okla. 1971), *aff'd*, 465 F.2d 25 (10th Cir. 1972) 3, 35-36

In re Four Seasons Securities Laws Litigation, 58 F.R.D. 19 (W.D. Okla. 1972) 8, 10

Cases *Page*

In re Four Seasons Securities Laws Litigation, 361 F. Supp. 636 (J.P.M.L. 1973) 4

In re Four Seasons Securities Laws Litigation, 328 F. Supp. 221 (1971); 331 F. Supp. 559 (1971); 342 F. Supp. 758 (1972); 344 F. Supp. 1404 (1972); 352 F. Supp. 962 (1972); 352 F. Supp. 964 (1973); 355 F. Supp. 1405 (1973) (all J.P.M.L.) 2

Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973) 16, 25-27

Green v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968) 7

Greenspun v. *Bogan*, 492 F.2d 375 (1st Cir. 1974) 21, 35

Hansberry v. *Lee*, 311 U.S. 32 (1940) 16, 18, 21-23

Jacobs v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967) 7

Klapprott v. *United States*, 335 U.S. 601 (1949) 33, 34

Morris v. *Burchard*, 51 F.R.D. 530 (S.D.N.Y. 1971) 7

Moscarelli v. *Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968) ... 7

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 24

Mungin v. *Florida East Coast R.R.*, 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971) 20, 34

Philadelphia Housing Authority v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970) 32

Price v. *Skolnik*, 54 F.R.D. 261 (S.D.N.Y. 1971) 7

Research Corp. v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970) 21, 34

Research Corp. v. *Edward J. Funk & Sons Co.*, 15 F.R. Serv. 2d 580 (N.D. Ind. 1971) 21, 34

Cases *Page*

Richland v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967) .. 7

Rivera v. *Chicken Delight, Inc.*, 17 Fed. R. Serv. 2d 473 (S.D. Tex. 1973) 21, 34

Sampson v. *Radio Corp. of America*, 434 F.2d 315 (2d Cir. 1970) 33

School District of Philadelphia v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) 21

Shaul v. *Crofters, Inc.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas) 3, 12

State of Minnesota v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968) 21

State of Ohio v. *Crofters, Inc.*, CIV-72-81 (United States District Court for the Southern District of Ohio) 3, 4, 12

State of Ohio v. *Herbert*, 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas) 4, 12

State of West Virginia v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) 29

Supermarkets General Corp. v. *Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), *aff'd sub nom. Manhattan-Ward* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974) 21, 34

Transit Cas. Co. v. *Security Trust Co.*, 441 F.2d 788 (5th Cir. 1971) 34

United States v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951) 21, 34

STATUTES:

Ohio Rev. Code § 135.14 (1967) 2

28 U.S.C. §§ 1291 and 1292 (b) 15

Page

OTHER AUTHORITIES:

Advisory Committee Notes to the 1966 Amendments to Rule 23 ..... 19-20, 26, 28

B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 Harv. L. Rev. 356 (1967) 23

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Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974) 29-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-379

STATE OF OHIO,

Petitioner,

vs.

ARTHUR ANDERSON & CO., JACK L. CLARK, GORDON H. MCCOLLUM, GLENN R. MILLER, MONTGOMERY CO., AND WALSTON & CO., INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Whether a member of a class created by the order of a district court pursuant to Rule 23 (b) (3), who:

(a) receives timely notice by certified mail return receipt requested of a proposed settlement judgment and the hearing scheduled thereon;

(b) fails to request exclusion from the class; and

(c) fails to appear at the scheduled hearing announced in the notice;

can later move successfully pursuant to Rule 60 (b) to be relieved from the operation of the class action settlement judgment entered pursuant to the notice?

STATEMENT

As the Tenth Circuit recognized, this case presents "a unique factual situation."* In March 1970, State of Ohio, acting pursuant to a state statute authorizing the investment of state treasury funds in private commercial enterprises,** loaned Four Seasons Nursing Centers of America, Inc. ("Four Seasons") $4 million. In return, Four Seasons issued to Ohio three unsecured "commercial paper" notes with maturities up to two years. Four Seasons entered Chapter X corporate reorganization proceedings under the Bankruptcy Act in June, 1970. The bankruptcy proceedings spawned numerous civil lawsuits (many purporting to be class actions) brought by former security holders of Four Seasons and related or affiliated companies under the federal securities laws. Most of these lawsuits were consolidated for pre-trial purposes by the United States Judicial Panel on Multidistrict Litigation and transferred to the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1407.*** The transferred cases were assigned to Senior United States District Judge Roszel C. Thomsen from the District of Maryland and became known as M.D.L. 55.

Ohio first sought to recover the $4 million represented by the Four Seasons unsecured "commercial paper" notes

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* App. A-17. Throughout this Opposition citations to Ohio's Appendix to its Petition will be in the form (App. A). Citations to the Joint Appendix in the Court of Appeals which has been transmitted to this Court in lieu of the record will be in the form (J. A.). Citations to the record will be in the form (Record).

** Ohio Rev. Code § 135.14 (1967).

*** *Four Seasons Securities Laws Litigation*, 328 F. Supp. 221 (1971); 331 F. Supp. 559 (1971); 342 F. Supp. 758 (1972); 344 F. Supp. 1404 (1972); 352 F. Supp. 962 (1972); 352 F. Supp. 964 (1973); 355 F. Supp. 1405 (1973); all decided by the Judicial Panel on Multidistrict Litigation.

through a fraud-based reclamation claim in the Four Seasons Chapter X proceedings. After a full hearing on the merits, this claim was decided against Ohio. *In re Four Seasons Nursing Centers of America, Inc.*, 329 F. Supp. 647 (W.D. Okla 1971), *aff'd*, 465 F.2d 25 (10th Cir. 1972). Ohio then sued certain M.D.L. 55 defendants, including respondent Jack L. Clark (CLARK), the former President and Chairman of the Board of Directors of Four Seasons, in the United States District Court for the Southern District of Ohio alleging that the unsecured "commercial paper" notes purchased by Ohio were securities under the federal securities laws, that such securities had been sold to Ohio on the basis of financial statements which were false and misleading, and that Ohio "was a person, or *belonged to a class of persons*, which defendants knew or had reason to believe would be influenced by such false and misleading statements." Complaint in *State of Ohio* v. *Crofters, Inc.*, Civil Action No. 72-81, ¶¶ 3, 20, 21, 23, 55.* (J. A., I, 416, 418-19, 430-31). [Emphasis added.]

In a separate action Ohio also sued former State officers and their surety bonding companies alleging that such former State officers had improperly and fraudulently performed their duties in authorizing the loans to Four Seasons, during their terms of office. Specifically, Ohio alleged that the loans to Four Seasons and other unrelated companies were made with "willful or gross and reckless disregard for the safety of public funds by John D. Herbert," former Treasurer of the State of Ohio, and "willfully, in-

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* The complaint alleged violations of Section 17 (a) of the Securities Act of 1933, 15 U.S.C. § 77 *q* (a), and Sections 10 (b) and 15 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78 *j* (b) and *o*, (all of which were relied upon by plaintiffs in the class actions), as well as certain provisions of the Ohio blue sky laws and common law fraud standards. Ohio also sued CLARK and others in State court seeking injunctive relief with respect to the same transactions. *Shaul* v. *Crofters, Inc.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas).

tentionally, and with full knowledge of their illegality and risk of loss" by Robert F. Gardner, the Deputy Treasurer. Complaint in *State of Ohio* v. *Herbert*, 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas). (R., I, 384). The defendants in the latter action filed third party complaints against CLARK and others.*

None of the parties to these suits in Ohio moved pursuant to 28 U.S.C. § 1407 to consolidate them into M.D.L. 55 until after the M.D.L. 55 settlement described below was concluded.**

The Trustee of the Four Seasons companies ("Trustee") also sued CLARK and other M.D.L. 55 defendants in a third set of parallel lawsuits alleging wrongs based on some

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* Ohio has also attempted to prosecute criminally several persons associated with the Ohio brokers, Crofters, Inc. and Dee-Gee Company, who served as finders in arranging the sale of the notes to Ohio. In each case, the defendants have been acquitted, once by an Ohio judge, and once by an Ohio jury. CLARK and seven other persons were indicted by a federal grand jury in the Southern District of New York on charges relating to the financial collapse of the Four Seasons companies. CLARK subsequently entered a narrowly limited guilty plea to an 18 U.S.C. § 371 conspiracy offense admitting only that he conspired to conceal certain information from the public in April 1970, after the Ohio loans were consummated. CLARK denied all other wrongdoing. All other charges against CLARK in the indictment were dismissed. CLARK's guilty plea statement, accepted by the district court and the prosecution as the factual basis supporting the plea of guilty, specifically denied any illegality regarding the Ohio loans.

** Although the *State of Ohio v. Crofters, Inc.* case pending in the United States District Court for the Southern District of Oklahoma had not been transferred to M.D.L. 55 when the district court rendered its opinion relieving Ohio from the operation of the class action judgment on June 11, 1974, the Judicial Panel on Multidistrict Litigation subsequently transferred the *Crofters* case to M.D.L. 55. *In re Four Seasons Securities Laws Litigation*, 361 F. Supp. 636 (J.P.M.L. 1973).

of the same transactions. These "plenary" suits were never consolidated into M.D.L. 55.

Ohio's assertion that "M.D.L. 55 was pending for 14 months before the District Court indicated its readiness to determine whether the actions could be maintained as class actions"* is misleading. When the consolidated lawsuits were transferred to Oklahoma, the district court was faced with numerous suits on behalf of overlapping classes. Pursuant to the wishes of all parties, the court supervised discovery pertinent to class action issues in preparation for hearings on a class action determination pursuant to Rule 23 (c) (1). Over a period of several months, extensive discovery resulted.** At the time of the hearings on motions for the class action determination plaintiffs' counsel had "a fairly extensive knowledge of just about everything that [they] could hope to prove, what defenses would be . . . and a fairly inclusive idea of what the whole case was about."***

In May, June and July 1972 the parties in M.D.L. 55 briefed and argued their class action positions.**** Counsel for certain plaintiffs argued that there should be one class comprised of all persons who purchased securities is-

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* Petition for Certiorari, at 15.

** Plaintiffs secured deposition or statement testimony from at least 15 witnesses, including the defendant CLARK, two of Four Seasons' attorneys, three of its accountants and the two top Walston executives who served on the Four Seasons Board of Directors. Plaintiffs' counsel also spent more than 50 whole man-days collecting and analyzing more than three full filing cabinets of documents. (J. A., II, 761-64).

*** Statement of Marvin Cherner, one of the counsel for class plaintiffs Sher and Ginsberg. (J. A., II, 763).

**** Two of the complaints, the Sher and Fetman complaints, ultimately designated class actions were filed on behalf of "all security purchasers" of the Four Seasons companies who suffered losses. (J. A., I, 180-82, 200-202).

sued by Four Seasons or related or affiliated companies.* Other plaintiffs' counsel had different formulations, which clearly included Ohio as a potential class member.**

The statements of position filed by the representative plaintiffs also contained numerous allegations that Four Seasons' conduct in connection with the Ohio loans was unlawful and constituted a ground upon which the classes could recover against the M.D.L. 55 defendants. For example, one class plaintiff alleged as a specific wrongful act "the failure to disclose and report finders fees and all the details of certain loan transactions among Nursing [Four Seasons], the State of Ohio, Financial Relations, Inc., and Crofters."

As a defendant in the cases ultimately certified as class actions, CLARK argued vigorously that these cases should not be allowed to proceed as class actions because the representative plaintiffs could not adequately represent all pur-

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* "The only practical solution is to consider all purchasers of securities, whether of Four Seasons America or Four Seasons Equity or other affiliates, to be considered as belonging to one and the same class. All such purchasers were misled and deceived by the same acts, practices and courses of conduct for which the Defendants herein are liable, and all should participate in any recovery on the same basis."

Supplement to Plaintiff Sher's Objection, Response and More Definite Statement of Class Claim and Further Statement with Respect to Certain Additional Matters, dated May 15, 1972.

** ". . . I suggested that the 'lawsuits' for class action notice purposes be broadly defined to include all securities claims made under any of the proposed class action suits. I respectfully suggest that by so doing everyone's rights will be protected *including the res judicata effect of any class determination.*"

Letter from Harry A. Young, Jr., counsel for class plaintiff Fetman, to the district court, dated July 14, 1972. (Emphasis added.)

chasers of all Four Seasons securities. Thus, early in this litigation CLARK took precisely the same position that Ohio now espouses. Specifically, CLARK argued that representation could not be adequate because members of the purported classes purchased different types of securities. CLARK also argued to the district court that the representation could not be adequate because different kinds of misrepresentations were allegedly made to different members of the classes. Likewise CLARK argued that some absent class members would undoubtedly prefer to pursue legal theories or seek remedies other than those sought by the representative plaintiffs. In so doing, CLARK cited to the district court substantially the same authorities relied upon by Ohio to support its inadequate representation claim in this case.*

After considering the arguments of CLARK and of other defendants opposing class action designation, and after weighing the representative plaintiffs' counterarguments at great length, the district court *rejected* CLARK's and other defendants' arguments and announced its intention to enter a class action designation order permitting the five actions

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* *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972); *Price* v. *Skolnik*, 54 F.R.D. 261 (S.D.N.Y. 1971); *Morris* v. *Burchard*, 51 F.R.D. 530 (S.D.N.Y. 1971); *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971); *Moscarelli* v. *Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968); *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Richland* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Burstein* v. *Slote*, 12 Fed. R. Serv. 2d 577 (S.D.N.Y. 1968), cited by Ohio to support its inadequate representation argument in its Brief in Opposition to the Tenth Circuit were all cited by CLARK in his effort to avoid the designation of these cases as class actions in an earlier stage of this litigation. In addition CLARK, unlike Ohio noted the substantial authority to the contrary, including *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), a leading securities class action case.

to proceed on behalf of two classes.* Ohio was a member of one of the classes. (App. A77 n.28).

At that point the M.D.L. 55 parties advised the district court that serious settlement discussions were in progress. The court granted the parties time to pursue settlement. The M.D.L. 55 defendants conducted simultaneous negotiations with the M.D.L. 55 named class plaintiffs and the Trustee.** As the negotiations progressed the M.D.L. 55 defendants tentatively agreed to pay $7 million to the plaintiff classes in settlement of the representative actions and $1.5 million to the Trustee in settlement of the four plenary suits maintained by the Trustee against some of the M.D.L. 55 defendants. Although each settlement was conditioned upon judicial approval of the other, the two settlements—one with the Trustee and the other with the classes—were separate.

The negotiations between the M.D.L. 55 defendants and the Trustee affected Ohio. Ohio had filed appeals from the adoption and confirmation of the Trustee's Plan of Reorganization for the Four Seasons Companies. As a condition of their $1.5 million payment to the Trustee in settlement of the Trustee's parallel plenary suits, the M.D.L.

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* The district court allowed the class actions to proceed, at least for discovery purposes "upon a single conspiracy theory." *In re Four Seasons Securities Laws Litigation*, 58 F.R.D. 19, 38 (W.D. Okla. 1972). It is clear that Ohio, which alleges that it relied on annual and interim financial statements of Four Seasons, was as much a victim of this conspiracy (if it existed) as any other purchaser of securities issued by the Four Seasons companies. The district court recognized that under a single conspiracy theory, when the accuracy of the identical financial statements is at issue, purchasers of different kinds of securities sold in various public and private offerings could all be represented by the representative plaintiffs, whereas if separate alternative legal theories were pursued, the representative parties might be able to represent only specified subclasses. *Id.* at 38-39.

** The Trustee was not a party to any of the M.D.L. 55 cases. He had, however, brought separate plenary suits against CLARK and others on behalf of the Four Seasons debtor estates.

55 defendants insisted that the Trustee, as part of his settlement with Ohio, secure dismissal of its fraud claims against the M.D.L. 55 defendants in the *Crofters* case. (J. A., II, 551-52). This, the Trustee and his attorney were unable to do. Finally, on September 7-8, 1972, some of the counsel for the M.D.L. 55 defendants met with the attorney for the Trustee and representatives of Ohio to attempt to persuade Ohio to include in its settlement with the Trustee a release of claims against the M.D.L. 55 defendants.* (J. A., II, 563-65). Ohio refused to settle with the Trustee on the terms offered. (J. A., II, 576-77). After the September 7 meeting the M.D.L. 55 defendants agreed to settle with the Trustee even though he could not secure the desired release of claims against them from Ohio. (J. A., II, 565).**

It is apparent from Ohio's participation in these meetings that Ohio's Assistant Attorneys General were aware of on-going settlement negotiations in M.D.L. 55. They were, or should have been, aware that the on-going negotiations could affect Ohio's rights.

On September 21, 1972 the district court signed an order in M.D.L. 55 tentatively designating five of the actions as class actions on behalf of two classes of plaintiffs. Simultaneously, the court tentatively approved the $8.5 million cash settlement for submission to the classes.*** The Settle-

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* At no time on or before September 21 did the M.D.L. 55 defendants offer to make any payment to Ohio. (J. A., II, 586-87). The only consideration offered to Ohio was that offered by the Trustee.

** The Trustee concluded a separate settlement with Ohio which did not include a release of Ohio's claims against the M.D.L. 55 defendants. (J. A., II, 565-66).

*** In addition to the cash—$7 million of which was to be distributed to the plaintiff classes and $1.5 million of which was paid to the Trustee of the Four Seasons debtor estates in a separate settlement of the four plenary suits brought by him—certain defendants released claims against the Trustee or certain class members having a value in excess of $1.5 million.

ment Order provided for extensive notice (1) by certified mail to persons who were known to the parties because they had brought individual actions, (2) by regular mail to all persons whose name and address were known to the Trustee in the Reorganization Proceedings, and (3) by publication in the national edition of the *Wall Street Journal*. The Settlement Order further provided that any class member could request exclusion from the classes and that anyone affected could appear and be heard at the hearing to be held on the fairness, reasonableness and adequacy of the settlement. Finally, the Settlement Order warned that any member of either of the classes who failed to request exclusion from the classes would be bound by the orders of the court approving or disapproving the settlement whether or not such class member had previously maintained an individual action based on transactions in the securities of the Four Seasons companies.*

Ohio, as a purchaser of securities issued by Four Seasons and a member of one of the classes, was sent two separate notices by certified mail return receipt requested. The Ohio Attorney General's office received and signed receipts for separate, but identical, notices on October 6 and October 10, 1972. (App., II, 598). The notice labeled for the attention of certain purchasers of "securities or commercial paper" issued by the Four Seasons companies informed Ohio of its right to be heard at the settlement hearing as well as its right to request exclusion from the classes. Ohio did not request exclusion from the classes by the November 1, 1972 deadline; nor did it appear at the November 16-17 hearings on the fairness, reasonableness and adequacy of the settlement. The fact that Ohio was within the classes of plaintiffs embraced by the Settlement Order was specifi-

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* *In re Four Seasons Securities Laws Litigation*, 58 F.R.D. 19 (W.D. Okla. 1972) (App., A79-A85).

cally brought to the attention of the district court at the hearing on the proposed settlement.*

After the November 16, 1972 hearing, the district court "confirmed and made absolute, unconditional and final,"** its earlier tentative findings that (1) "the claims of the representative parties are typical of the claims of such class," and (2) "the representative parties in these class actions will fairly and adequately protect the interests of such class." (J. A., I, 220).

The settlement was approved and on November 30, 1972 and the district court signed a "Final Judgment Approving Settlement and Plan of Distribution and Dismissing Claims

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* "MR. MATHEWS: . . . CLARK was a party to the State of Ohio's petition in reclamation, and we have had a mini-trial of some of the issues in this case, and we have read a lot of accusations, the accusations are encompassed by the complaints in this case now and some of the same issues would be at issue here, and that was the case where the State of Ohio tried to challenge, amongst other things, the accounting methods utilized by Four Seasons, including accounting for franchise income and accounting for construction profits, and that is the case where the State of Ohio relied upon the SEC and its expert, James Eichstaedt, a C.P.A. attorney, to try to prove its case, and I don't mean to raise the issue of collateral estoppel, or any of that, I just want to raise the issue of the problems of trying a case like this. That matter was bitterly litigated in Judge Bohanon's courtroom here in Oklahoma City, the SEC expert witness didn't hold up after cross examination on the stand, the allegations made by the improper accounting were not proven, the Federal District Court found that *the State of Ohio, who falls within the classes here represented by the plaintiffs,* had not proven that they had been defrauded; and that was affirmed by the Tenth Circuit." (J. A., II, 771). (Emphasis added.)

** Final Judgment Approving Settlement and Plan of Distribution and Dismissing Claims with Prejudice. (J. A., I, 310). The Final Judgment confirmed the tentative finding of adequate representation only after specifically finding that notice had been given to the State of Ohio. (J. A., I, 304-306).

with Prejudice."* The Final Judgment, which was obviously intended to bind Ohio as an absent class member,** barred forever the prosecution of any and all claims which "have been or could be asserted by or on behalf of the classes . . . or any member thereof, arising out of or relating to any act or omission relating to [the Four Seasons companies] . . . or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the *securities or commercial paper* of any of the Four Seasons companies . . . ."*** A copy of the Final Judgment was mailed to and received by Ohio.

As required by the terms of the Final Judgment, the contributing defendants, including CLARK, deposited $8.5 million in cash with the court-appointed Escrow Agent be-

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* This judgment was actually filed in the office of the Clerk of the United States District Court for the Western District of Oklahoma on December 4, 1972.

** The Final Judgment contained an *express finding* that notice has been sent to Ohio in its capacity as a party litigant in three lawsuits involving the Ohio loans to Four Seasons. Specifically, the Final Judgment stated that

> "[a]t the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the *securities or commercial paper* of the Four Seasons Companies, the Trustee timely served by registered mail a copy of the order and its exhibits, including the notice annexed thereto, upon all named plaintiffs in the following actions:
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> • • •
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> *"State of Ohio v. Crofters, Inc., et al.,* Civ-72-81 (United States District Court for the Southern District of Ohio);
>
> *"Shaul v. Crofters, et al.,* 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas);"

and upon third party plaintiffs entitled:

> *"State of Ohio v. John D. Herbert, et al.,* 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas)." (J. A., I, 304-05). (Emphasis added.)

*** Emphasis added.

tween December 4, 1972 and December 14, 1972. Ohio knew or should have known from the notices and Final Judgment received by it that the defendants were required to make such cash deposits.*

On December 21, 1972, after the Final Judgment had been entered and the M.D.L. 55 defendants had deposited $8.5 million with the court-appointed Escrow Agent, Ohio moved pursuant to Rule 60 (b) to be relieved from the operation of the Final Judgment.** Ohio argued that its failure to request exclusion from the classes was due to excusable neglect (under Rule 60 (b) (1)); that the Final Judgment was void as to Ohio because it had not been adequately represented by the class plaintiffs (under Rule 60 (b) (4)); and that the district court, in the exercise of its discretion under Rule 60 (b) (6), should relieve Ohio from the operation of the Final Judgment.

The district court found Ohio's claim for relief under Rule 60 (b) (1) to be without merit. It found that Ohio had received due notice of the class action determination and of the proposed settlement. Despite Ohio's urging the district court refused to find that every Ohio Assistant Attorney General working on Four Seasons matters had actually failed to read the Settlement Order and notice. Instead the district court held:

> "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." (App. A40).

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* The Settlement Order, two copies of which were received by Ohio, provided: "All cash contributions by or on behalf of the defendants to the Settlement Fund shall be made no later than ten (10) days after the later of the entry of the final judgment pursuant to paragraph 11 of this Order and the entry of the final judgment [settling the Trustee plenary suits]." (J. A., I, 227). Ohio received copies of both such final judgments.

** Ohio voluntarily relinquished any right that it might have had to appeal from the Final Judgment. (J. A., I, 365-66).

The district court determined that such negligence was *not* excusable. (App. A43).

The district court also declined to find Ohio's 60 (b) (4) assertion of denial of due process persuasive. It reviewed the securities law fraud allegations in Ohio's complaint against some of the M.D.L. 55 defendants and determined that such allegations were similar to those made by the representative plaintiffs in the class actions.* (App. A48).

Ohio challenged the plan of distribution as demonstrating that it was inadequately represented because its claim was reduced to 10% of the face amount to compensate for the extra amount which Ohio had received as a Class C creditor in the Reorganization Proceedings. The district court rejected this contention and reaffirmed its earlier finding that the plan of distribution was fair. (App. A48).

Finally, Ohio argued that through communications among the Trustee, his counsel, counsel for some of the M.D.L. 55 defendants and various representatives of the State of Ohio, Ohio had been lulled into the erroneous belief that it was not affected by the class actions or the settlement thereof. The district court found that neither the attorneys for the M.D.L. 55 defendants nor the Trustee made any misrepresentation or deliberately misled Ohio's attorneys.**

Nevertheless, on a finding that, through "unintentional and non-deliberate 'lulling'," Ohio had formed the false belief that it would be unaffected by the M.D.L. 55 class actions (App. A42), and that the M.D.L. 55 defendants ex-

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* The court did determine that Ohio's allegations against its own former State officers and their bonding companies in another action instituted by Ohio in Ohio state court involved claims which were not similar to those made by the representative plaintiffs in the class actions. (App. A48).

** The Court stated:

"The court does not suggest that the Trustee or his attorney or any of the M.D.L. 55 attorneys acted unfairly or in bad faith with respect to Ohio." (App. A50).

pected Ohio to opt out of the class actions (App. A41, A50), the district court decided to exercise its limited discretion under Rule 60(b)(6) to relieve Ohio from the operation of the Final Judgment.

CLARK and the other respondents appealed to the Tenth Circuit pursuant to 28 U.S.C. §§ 1291 and 1292(b).* The Court of Appeals carefully analyzed the opinion of the district court and concluded that "the real basis for the court's decision below, notwithstanding the analysis directed to particular clauses under Rule 60, was its belief that under all of the circumstances presented Ohio was simply denied due process of law." (App. A15). The Court of Appeals then held that since Ohio had received notice not only of the class designation but of the precise terms of the impending judgment, it had been afforded a unique opportunity to judge for itself whether it had been adequately represented.** Under these circumstances, the

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* In order to avoid any question concerning the appealability of an order granting relief under Rule 60(b), the respondents sought and obtained certification by the district court and permission for leave to appeal from the Court of Appeals under 28 U.S.C. § 1292(b). Respondents also filed notices of appeal under 28 U.S.C. § 1291.

** The Court of Appeals held:

> "[W]e consider here an action in which Ohio not only received notice of its inclusion within the designated class, with the concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied . . . .
>
> "We are constrained to conclude that due process was satisfied here when Ohio received the notice and order delineating the terms of the proposed settlement and informing Ohio that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out." (App. A18-A19).

Court of Appeals found that Ohio had been accorded due process, reversed the decision of the district court, and ordered that the class action settlement judgment entered December 4, 1972 be reinstated as to Ohio.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

SUMMARY

I

In a Rule 23 (b) (3) class action, notice reinforces the initial adequacy of representation finding made at the class designation stage. The district court, after months of extensive discovery and vigorous hearing, made the required finding of adequacy of representation at the class designation stage. Since Ohio, an absent class member, was afforded notice, an opportunity to be heard and the right to request exclusion through formal notice by certified mail return-receipt-requested, the procedures followed fairly insured protection for Ohio's interest. There was no departure from *Hansberry* v. *Lee* or *Eisen* v. *Carlisle & Jacquelin*.

II

The Tenth Circuit's decision is in accord with the express language of the Fifth Circuit's decision in *Gonzalez* v. *Cassidy*. Both courts recognize that the unique notice and opt-out provisions applicable to Rule 23 (b) (3) class actions require a different treatment of adequacy of representation questions than is required for (b) (1) or (b) (2) class actions.

III

The decision of the district court, which revived the threat of "one-way intervention" in Rule 23 (b) (3) class actions, severely undermined the finality of class action

judgments and discouraged class action settlements. The Court of Appeals recognized these hazards and corrected the error. No action by this Court is required.

IV

The procedures for notice followed in this case fully protected and even augmented the rights of absent class members. The reasons for the *Manual for Complex Litigation's* objection to the practice of combining notice for class determination under Rule 23 (c) (2) with the notice of settlement under Rule 23 (e) were not present. Furthermore, blind adherence to the Manual's recommendations may in some instances impede settlement of class actions.

V

The holding of the Tenth Circuit was fully in accord with the law governing Rule 60 (b). Relief may not be had under Rule 60 (b) (6) for reasons subsumed within but insufficient under the first five clauses of Rule 60 (b). Furthermore, Rule 60 (b) (6) is not applicable to a moving party who fails to demonstrate exceptional and extraordinary grounds for relief, whose situation is clearly the result of its own negligence, and who has little likelihood of success on the merits of his claim or defense.

PREFACE

Ohio has petitioned this Court solely to secure relief from its own inexcusable neglect: None of the several Assistant Ohio Attorneys General assigned to handle *Four Seasons* matters bothered to respond to the formal class action notice received by Ohio by certified mail return-receipt-requested. The notice received by Ohio and physically handled by at least two Assistant Ohio Attorneys General expressly gave Ohio the right (1) to enter an appearance through counsel; (2) to oppose the court's selection of representative parties; (3) to oppose the settlement proposed in the notice; or (4) to request exclusion from the

class actions altogether. However, Ohio in an exercise of *inexcusable neglect* ignored the notice. Thus, Ohio asks this Court to jeopardize the finality of class action judgments and impede the settlement of complex multi-party, multi-district litigation by holding that the Attorney General of Ohio or his Assistants, unlike all other litigants, need not read their certified mail.

Point I

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH RULE 23 AND THE APPLICABLE DECISIONS OF THIS COURT.

Ohio argues in its Petition that the Court of Appeals has effectively written the adequacy of representation requirement out of Rule 23 (b) (3) class actions, thereby violating Rule 23, ignoring *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and sidestepping dicta in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974). Ohio's arguments collapse under careful analysis.

None of the parties to this controversy disputes that Rule 23 requires a finding of adequacy of representation at the stage of the proceeding at which the district court determines under Rule 23 (c) (1) that the case may be maintained as a class action. That finding was made in this case. It was tentatively made on July 20, 1972, after vigorous argument, when the district court announced its decision to maintain the actions as class actions. A formal, but still tentative, finding of adequacy of representation was made in the September 21, 1972 class designation and settlement order. Then after notice to the class, including notice by certified mail return-receipt-requested to Ohio, a hearing was held on adequacy of representation. After the day-long hearing at which the adequacy of representation question was again hotly contested, the district court "confirmed and made absolute, unconditional and final," its earlier tenta-

tive findings that (1) "the claims of the representative parties are typical of the claims of such class," and (2) "the representative parties in these class actions will fairly and adequately protect the interests of such class." (J.A., I, 220).

Rule 23 also carefully defines the scope of the judgment in a Rule 23 (b) (3) class action, such as the class actions in the instant case. The rule provides that in the case of a (b) (3) type action:

> "The judgment . . . whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and have not requested exclusion, and whom the court finds to be members of the class." Rule 23 (c) (3).

Moreover, the advisory committee notes to Rule 23 provide:

> "The judgment in a class action maintained as such to the end will embrace the class, that is, . . . in a class action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class."*

The draftsmen of the 1966 amendments to Rule 23 gave binding effect to notice because they recognized that it afforded absent class members an opportunity to object to the selection of the representative plaintiff and to challenge the adequacy of his representation. Thus, the advisory committee notes specifically recognize that "[n]otice has gone to members of a class so that they might express any opposition to the representation" and that notice may be "par-

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* Advisory Committee Notes to the 1966 Amendments to Rule 23—Subdivision (c) (3)—Effect of Judgment.

ticularly useful and advisable in certain class actions maintained under the subdivision (b) (3), for example, to permit members of the class to object to the representation."*

Since 1966 the federal courts have repeatedly enforced class action judgments against those who received notice. *Mungin* v. *Florida East Coast R.R.*, 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971), involved an attempt by class members, like Ohio, who had not responded to notice or appeared at a settlement hearing, to seek relief from a judgment entered pursuant to a class action settlement. The court held:

> "At the time the Court ordered the giving of notice, there was no evidence before the Court of any type of dissension among the class nor or any lack of cohesiveness or unity in the class nor any evidence to indicate that the representation of the class was ineffective . . . . *The Court finds that both timing and content of the notice of final hearing was sufficient to apprise all members of the class of the matters involved in the March 11th hearing, and to put them on actual, or at the very least, binding constructive notice of such matters and complied with Rule 23. Any failure thereafter by them to make further investigation cannot be any basis for relief from the judgment.*" *Id.* at 733-34. [Emphasis added.]

Similarly in *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), the court held absent class members to the terms of notices they received. The court stated:

> "Members of a class, having had full notice of the proceedings and an opportunity to seek the advice of a

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* *Id.*—Subdivision (d) (2)—Notice. Rule 23 (c) (2) expressly provides that the notice in a class action maintained under (b) (3) must advise that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

> lawyer of their own choosing and not having availed themselves of that opportunity, may not ignore the advice of qualified counsel for the class and later complain about the advice given." *Id.* at 1006.

Numerous other federal courts have also strictly enforced the terms of the class action notices against absent class members. *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Rivera* v. *Chicken Delight, Inc.*, 17 Fed. R. Serv. 2d 473 (S.D. Tex. 1973); *Supermarkets General Corp.* v. *Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), *aff'd sub nom. Manhattan-Ward* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974); *Research Corp.* v. *Edward J. Funk & Sons Co.*, 15 F.R. Serv. 2d 580 (N.D. Ind. 1971); *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 69 Civ. 5559 (S.D.N.Y. 1970) (unreported); *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951). *See Greenspun* v. *Bogan*, 492 F.2d 375 (1st Cir. 1974).

In short, the current law under Rule 23(b) (3) is that absent class members "are compelled when in receipt of notice under Rule 23 (c) (2) to make a binding decision within a short time"* and where a class member "simply *ignores* the notice, whether by intention or by inadvertence, it becomes, by inaction alone, a member of the class to be bound by the judgment."** The Tenth Circuit in the instant case correctly applied the law as stated above.

Neither these principles nor the decision below is inconsistent with *Hansberry* v. *Lee*, 311 U.S. 32 (1940). *Hans-*

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* *State of Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 575 (D. Minn. 1968).

** *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967). "The fundamental structure of the (b) (3) class action under Rule 23 is that all class members are bound who do not request exclusion." *B&B Investment Club* v. *Kleinert's, Inc.*, 18 Fed. R. Serv. 2d 746, 753 (E.D. Pa. 1974).

berry concerned the inequity of binding an absent class member to a judicial decision when he was neither adequately represented nor cognizant of the existence of legal proceedings directly affecting his rights. The black plaintiffs in *Hansberry* were members of a class of persons opposing the binding effect of a racially restrictive agreement. In an earlier litigation, in which all the contestants had an overriding interest in establishing the validity of the racially restrictive agreement, a crucial issue of fact was decided. It was the *res judicata* (or collateral estoppel) effect of this factual determination which was challenged by the plaintiffs in *Hansberry*. Not surprisingly, this Court held that the binding of the *Hansberry* plaintiffs to the earlier decision would violate the requirements of due process since they had neither notice of, nor opportunity to participate in, the earlier proceeding and none of the parties thereto had represented their position. The test applied by this Court was whether the "procedure adopted [by the decision-rendering court], fairly insure[d] the protection of the interests of absent parties who [were] to be bound by it." *Id.* at 42.

There can be no doubt that the procedures employed in the instant class actions (unlike those in *Hansberry*) "fairly insure[d] the protection of the interest" of Ohio. In *Hansberry*, the absent class members had interests directly adverse to those who purportedly represented them. In the instant case the interests of Ohio were virtually identical to the interests of the class representatives—each sought to prove that its investment was made as a result of false Four Seasons financial information. Neither the district court nor the Court of Appeals has ever found Ohio to have been inadequately represented. Indeed, the district court expressly found the claims of the representative plaintiffs typical of most of Ohio's claims. (App. A48). In *Hansberry*, the earlier proceeding that purportedly bound absent "members" was not perceived to have been a class action until well after its conclusion. In the instant

case, after extensive hearings, and nearly four months before the Final Judgment bound Ohio, the trial judge determined the action to be a class action in which Ohio was a class member. Ohio has never challenged the validity of that determination.

In *Hansberry* no notice whatever was given to absent class members. In the instant case, Ohio, was notified of the class determination and the proposed settlement by certified mail, return receipt requested.* Representatives of the Ohio Attorney General signed receipts for two copies of the class action notice and Settlement Order almost two months before the Final Judgment was entered. An Ohio Assistant Attorney General was told of the settlement the day after the Settlement Order was signed. And two different Ohio Assistant Attorneys General actually handled the Settlement Order and notice within the period for requesting exclusion. One of them read at least the first page of the Settlement Order before filing it.

In short, the procedure employed in this case provided Ohio with far more than the "fundamental requisites of

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* Professor Kaplan in commenting upon the relationship between *Hansberry* and the 1966 amendments to Rule 23 stated:

> "It was plausible to suppose that where claimed inadequacy of representation was the nub of a collateral attack on a class judgment, the question whether members had been informed of the action and thereby had a chance to object to the representation would be distinctly relevant. Informal notice might be thought owing to the class members as a matter of 'common decency' quite apart from any constitutional necessity. But further, at least where the homogeneity or 'solidarity' of the class was open to some question, notice could bear directly on a court's authority to render a judgment with full binding effect on the class." B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 Harv. L. Rev. 356, 379-80 (1967). (Footnotes omitted.)

the constitutional guarantee of procedural due process."* Ohio had not only notice and an opportunity to be heard but was also informed of the precise terms of the impending judgment at a time when it could request exclusion if dissatisfied.

The Tenth Circuit did not, as Ohio suggests, eliminate the requirement for adequacy of representation from (b) (3) type class actions.** Rather the Court of Appeals recognized that the role played by adequacy of representation in a (b) (3) type class action depends in part on the *stage* of the proceedings. Its holding is entirely consistent with this Court's holding in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974). In *Eisen* this Court emphasized the critical importance of notice to absent class members in a Rule 23 (b) (3) class action. It held again, as in many previous cases,*** that notice and an opportunity to be heard were the touchstones of due process. Ohio, ignoring the holding and essence of *Eisen*, has plucked from it the single sentence that: ". . . Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Id.* at 2152.

By lifting this sentence from the context of the *Eisen* opinion *which dealt with the class action designation stage* of a Rule 23 proceeding, Ohio argues that the decision below is inconsistent with *Eisen*.

The import of the Tenth Circuit's decision is to recognize that when the requirements of sections (a) and (b) of Rule 23 have been fully followed at the class designation

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* *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2150 (1974).

** Indeed, the Tenth Circuit cited and embraced this Court's dicta in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974), that "Rule 23 speaks to notice as well as to adequacy of representation and requires both to be provided." (App. A18 n.11).

*** *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

stage, when the absent (b) (3) class members have had notice and an opportunity to appear, and the defendants have relied upon the Final Judgment of the district court by depositing funds for payment to the class, there is a balance between adequacy of representation and notice in the (b) (3) type action.* In short, proof that the absent class member received notice and had the "unique opportunity of judging, retrospectively, whether its interest *had been* adequately represented at a time when it was capable of excluding itself" satisfied due process.

Point II

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE FIFTH CIRCUIT DECISION IN *GONZALES* v. *CASSIDY*.

In its Petition, Ohio asserts that the decision in the instant case is in conflict with *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973). To construct this "conflict" Ohio ignores not only the sharp factual disparities between the cases but also the express language of both opinions.

Gonzales concerned the binding effect on absent class members of a judgment in a Rule 23 (b) (2) (not (b) (3)) class action—a type of Rule 23 class in which the absent class members are not necessarily entitled to notice and in which they have no right to request exclusion. In *Gonzales*, the Fifth Circuit held that an absent member of the (b) (2) class in a previous action had not been adequately represented because the class representative, having secured

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* The commentators have generally recognized that notice reinforces adequacy of representation.

> "When there is actual notice and an opportunity to be heard in a class or representative suit, adequacy of representation is immaterial in determining whether due process has been satisfied; the actual notice fulfills the requirements, just as it would in any other action."

F. Maraist and T. Sharp, *Federal Procedure's Troubled Marriage: Due Process and Class Action*, 49 Tex. L. Rev. 1, 9 (1970).

prospective relief from unconstitutional provisions of the Texas motor vehicle code, had failed to appeal the district court's denial of relief (retrospectively) to the vast majority of the class purportedly represented. The Fifth Circuit noted that a close scrutiny of adequacy of representation was required because *Gonzales* involved a (b) (2) type of class action:

> "One distinction between members of a class in a (b) (1), (b) (2), or (b) (3) action is that absent (b) (1) and (b) (2) members do not have the privilege of opting out of the suit that is accorded to class members in a (b) (3) suit. See *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (9th Cir., 1970); *Smith* v. *Alleghany Corp.*, 394 F.2d 381 (2nd Cir., 1968); Moore, ¶ 23.60 at 1202. Also, the mandatory notice requirements of 23 (c) (2) do not apply to (b) (1) and (b) (2) actions even though the discretionary notice provisions of (d) (2) are applicable. As a result of these distinctions class members in (b) (1) and (b) (2) actions must necessarily rely on the representative to protect their interests." 474 F.2d at 74 n.12.

Thus, the *Gonzales* court recognized, as did the drafters of Rule 23,* that the opting-out and mandatory notice provisions of the (b) (3) proceeding make it less likely that a (b) (3) class member will be committed to a representative deemed inadequate for his purposes than would be the case in a (b) (1) or (b) (2) type of class suit.** In other words

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* The drafters of Rule 23 recognized that notice provided absent class members with an opportunity to object to the selection of the representative plaintiff and to challenge the adequacy of representation. See pages 19-20, *supra*.

** The judgment in a (b) (1) or (b) (2) type action binds all class members, while the judgment in a (b) (3) type action binds only class members "to whom the notice . . . was directed and who have not requested exclusion." Rule 23 (c) (3).

the unique and rigorous notice provisions of Rule 23 (b) (3),* while not a substitute for adequate representation, do place some of the burden for judging adequacy of representation upon the absent class members who are most familiar with their own particular claims.

In the instant case, the Tenth Circuit arrived at the same conclusion and placed part of the burden of preserving its own interests upon Ohio. No class member could have been in a better position for judging the adequacy of representation afforded to it than Ohio, which was informed of the precise terms of the impending judgment.

Indeed, the absence of a conflict between the present case and *Gonzales* can be seen not only from the express qualification in the *Gonzales* opinion but also in the Tenth Circuit's careful discussion of the *Gonzales* case. (App. A17 n.9).

Point III

THE COURT OF APPEALS RECOGNIZED THAT THE DISTRICT COURT'S DECISION UNDERMINED THE ADMINISTRATION OF RULE 23.

The Court of Appeals recognized that the district court's decision sharply undermined the finality of class action judgments and properly corrected the lower court's clear

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* Ohio's quotation from *Gonzales* at page 12 of its Petition is misleading. In *Gonzales* no notice was sent to the absent class members, but the defendants nevertheless argued that those who accidentally learned of the decision in that case in time to appeal were not entitled to Rule 60 (b) relief. The *Gonzales* court never intended to say that absent class members were free to ignore official court approved notice. On the other hand, the Second Circuit has held that even informal communications put absent class members represented by counsel "on notice that a settlement was in the making and imposed on them a duty of diligence to keep abreast of developments." *Manhattan-Ward, Inc.* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974).

error. Rule 23 was amended in 1966 to prohibit the practice of "one-way intervention" which had grown up under the original Rule.* Under this practice the so-called "spurious" class action was allowed to go to judgment without first determining who would be bound by the judgment. If the defendant lost, absent class members could enjoy the benefits of the judgment; if the defendant won, the absent class members could avoid the judgment and relitigate their claims.

The effect of the district court's opinion here was to revive "one-way intervention." In most Rule 23 (b) (3) type classes, there are differences among the claims of the various class members, but representatives are nevertheless permitted to litigate class claims because the claims of the representative parties are "typical" and the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 23 (a). However, when a class action is permitted to proceed on the "typical" claims or the "common" questions, an absent class member can almost always demonstrate that his particular claim is somehow different and that he was therefore inadequately represented. To avoid this problem, which is particularly acute in securities cases,** the drafters of the amended Rule 23 required notice and

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* Advisory Committee Notes to the 1966 Amendments to Rule 23—Subdivision (c) (3)—Effect of Judgment.

** Virtually every class member in every securities fraud class action has some claims which are peculiar to him. Few purchasers buy securities directly from an issuer. In a case of the magnitude of the *Four Seasons Securities Laws Litigation,* involving actively traded exchange-listed, as well as privately placed, securities, there may be thousands of different sellers involved, i.e., virtually every broker and dealer in the United States. Each of these sellers may have made different representations to different purchasers. Moreover most states have their own state securities or "blue sky" law. In almost every instance where a federal securities law claim can be made, there can be a parallel state law claim. The timing of transactions may vary over a number of years. For example, the settlement

provided that the judgment would bind those absent class members "to whom notice . . . was directed, and who have not requested exclusion." Rule 23 (c) (3). In short, notice was made to reinforce the original adequacy of representation determination.

In the instant case, the district court allowed Ohio to reopen and reargue the question of adequacy of representation even though Ohio had received notice of and had failed to appear at the hearing held for the purpose of testing adequacy of representation. And the district court gave no weight whatsoever to the fact that the defendants had paid $8.5 million in reliance on the judgment.*

Because the district court's decision so severely undermined the finality of class action judgments, it was subject to scholarly criticism before the Tenth Circut reversed.

> "The liberal de novo review that was applied in *Research Corp.*, *Gonzales*, and *Four Seasons* ignores important policies underlying the class action device and may create substantial impediments to its effective operation. To facilitate successful challenges to the binding effect of class action judgments is to create a post-judgment election to opt out—'a return to one-way

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below covered purchases from May 9, 1968 to July 22, 1970. Economic conditions change over the course of time and may create claims unique to particular class members who purchased in the wake of particular events. In short, the fact that Ohio had some claims which were peculiar to it leaves Ohio in no different position than any other member of the settling classes.

* Compare District Judge Wyatt's statement in the $100,000,000 settlement in the drug litigation:

> "It is, however, important for the administration of justice that each order approving the proposed compromise and each judgment dismissing an action against defendants be final before any attempt is made to distribute the settlement amounts." *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 748 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

> intervention under a new guise.' Defendants might thus be placed in the position of having gone through complex and expensive class action litigation only to be forced to relitigate the entire controversy against parties that would have participated in the judgment if it had been favorable to them. Moreover, there is the irony that those attacking the judgment may rely successfully on the same arguments that failed when made by defendants to contest maintenance of the suit as a class action in the first place." Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589, 601 (1974). (Footnotes omitted.)

Fortunately the Tenth Circuit recognized the district court's error and corrected it, noting:

> "The purpose of class actions is to avoid multiplicity of suits and upholding the decision of the [district] court below would frustrate not only the interest in finality of judgments but also the interest in settlement of complex litigation." (App. A19).

There is no need for this Court to take any further action.

Point IV

THE NOTICE PROCEDURES FOLLOWED BY THE DISTRICT COURT IN THIS CASE WERE EXEMPLARY.

Ohio argues that the district court erred in combining the class action notice under Rule 23 (c) (2) with the settlement notice under Rule 23 (e). The only support offered for this position is the 1973 edition of the *Manual for Complex Litigation*.*

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* The portions of the Manual relied upon by Ohio were first adopted in January 1973, after the final class action judgment in this case was entered.

None of the evils condemned by the *Manual* were present in this case. There was extensive discovery and vigorous evidentiary hearings were conducted in the district court on the class action issues, including the adequacy of representation question. The district court announced its formulation of the appropriate classes and its appointment of class representatives before it was informed of serious settlement prospects. There was extensive information available to the court and the parties concerning liability, damages, and the expense of trial preparation and trial. Absent class members were afforded an opportunity to challenge the adequacy of the representative plaintiffs and did do so.

Significantly, there were valid reasons why the class action notice and the settlement notice had to be combined. At the time the district court completed the preliminary class determination discovery, held extensive hearings on the appropriate classes and announced its findings and conclusions on the class action issues, the parties were relatively close to settlement.* The court was then faced with two options—(1) send out the class notice and force the absent class members to commit themselves (by requesting exclusion or remaining in the classes) without knowing the terms of the possible settlement; or (2) delay the notice for a reasonable period so that the settlement terms could be finalized and communicated to absent class members who could then make a fully informed and intelligent decision. The district court properly elected the second option.

Since the *Manual* fails to provide an acceptable solution for this particular situation, its recommendations have not found wide acceptance. Indeed, the Second Circuit recently

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* Ohio paradoxically criticizes the district court for the delay in arriving at its decision on class action designation in an extremely complex multi-party, multi-class case, while citing the *Manual's* recommendation for evidentiary hearings on the class designation issues.

criticized these provisions of the *Manual* and refused to recognize them as absolute rules. The court stated:

> "It must also be remembered that these recommendations were not meant to be intractable rules. If they were applied blindly and without an appreciation of their implicit limitations in given circumstances, they might well jeopardize the right of many plaintiffs to recovery and even invite the likelihood that certain class action suits might never be settled at all." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 466 (2d Cir. 1974).

Moreover, in appropriate circumstances with proper safeguards, such as those applied by the district court in this case, combined class action and settlement notices have been approved by numerous courts. For example, a combined settlement and class designation notice was approved by the district court in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970), on the grounds that the procedure provided maximum protection for the absent class members. When the Third Circuit considered the same settlement in a related case, it observed that the combined notice procedure so effectively protected the rights of the absent class members that "there may be less need to police [such] settlements, since the question of fairness is left to the informed choice of the class members." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971).

This court should not grant certiorari for the purpose of attempting to prescribe in detail the complex and often difficult decisions a trial judge must make in his handling of complex class litigation. Moreover, it would clearly be inappropriate to apply any new procedural rules to complex litigation settled before publication of the new rules.

Point V

THE TENTH CIRCUIT FOLLOWED ESTABLISHED PRINCIPLES OF LAW IN OVERTURNING THE DISTRICT COURT'S DECISION TO GRANT OHIO RELIEF UNDER RULE 60(b)(6).

As indicated above, the district court's decision constituted a serious abuse of discretion that dangerously undemined the finality of class action judgments. It was therefore properly overturned by the Court of Appeals. The decision of the Court of Appeals is also in accord with the law governing the application of Rule 60 (b).

Relief should be granted under Rule 60 (b) (6) only if the gravamen of the movant's complaint does not come within one of the first five clauses of Rule 60 (b), *Klapprott* v. *United States,* 335 U.S. 601, 614-15 (1949), and the movant's circumstances are found to be exceptional, even extraordinary, *Ackermann* v. *United States,* 340 U.S. 193 (1950). Rule 60 (b) (6) relief is not to be granted to movants whose circumstances result from their own carelessness. *Carrethers* v. *St. Louis-San Francisco R.R.,* 264 F. Supp. 171 (W.D. Okla. 1967). Rule 60 (b) "cannot be used to avoid the consequences of a party's decision to settle." *Sampson* v. *Radio Corp. of America,* 434 F.2d 315 (2d Cir. 1970). Finally the movant's underlying claim must be meritorious. *Crane* v. *Kerr,* 53 F.R.D. 311 (N.D. Ga. 1971). Under these precedents, the Tenth Circuit correctly reversed the district court.

First, Ohio's only real ground for relief falls under Rule 60 (b) (1) and no other subdivision of Rule 60 (b). Every complaint made by Ohio can be traced to its failure to read its certified mail. The district court found that the failure of the Ohio Attorney General's office with 160 attorneys (at least 10 of whom had some responsibility for *Four Seasons* matters) to read certified mail from a United States District Judge was not excusable neglect. That decision is so plainly correct that Ohio does not now contest it. Yet, somehow, the district court turned a losing case under Rule

60 (b) (1) into a winning case under Rule 60 (b) (6). That was error. *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949). *See also Transit Cas. Co.* v. *Security Trust Co.*, 441 F.2d 788 (5th Cir. 1971); *Crane* v. *Kerr*, 53 F.R.D. 311 (N.D. Ga. 1971).

Second, Ohio's circumstances were not exceptional or extraordinary. Ohio was an absent member of a class action. Like hundreds of thousands of other absent class members in cases in every district court in the Nation, Ohio received a notice which defined its rights. There is nothing exceptional or extraordinary in the fact that Ohio was held to the terms of the notice. The same result has obtained in many others cases.* Indeed, Rule 23 (b) (3) class action notices must be enforced, if Rule 23 is to remain viable.

Third, Ohio's situation is clearly the result of its own carelessness and negligence. As the district court held: "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." (App., A40). But such negligence or carelessness by the movant has generally been held to preclude Rule 60 (b) relief. In a recent case involving a derivative class, the First Circuit held:

> "Rule 60 (b) of the F.R. Civ. P. is a remedial rule which normally receives a liberal construction from

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* *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Research Corp* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Rivera* v. *Chicken Delight, Inc.*, 17 Fed R. Serv. 2d 473 (S.D. Tex. 1973); *Supermarkets General Corp.* v. *Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), *aff'd sub nom. Manhattan-Ward* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974); *Research Corp.* v. *Edward J. Funk & Sons Co.*, 15 F.R. Serv. 2d 580 (N.D. Ind. 1971); *Mungin* v. *Florida East Coast R.R.*, 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd.* 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971); *Alpirre Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 69 Civ. 559 (S.D.N.Y. 1970) (unreported); *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951).

> courts concerned that cases not be decided in default against parties who are inadevertently absent . . . . [Citations omitted.] But the liberal construction is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients, not where the client's own internal procedures are at fault . . . . [Citation omitted.] Moreover, in a derivative action such as this, where the party claiming the benefit of the rule is one member of a large class who received notice, an indulgent construction of the rule might unduly protract settlement proceedings. This suggests that 60 (b) relief should rarely be given to any member of the class whose failure to appear at a hearing is due to mistake bordering on carelessness, or carelessness itself." *Greenspun* v. *Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

Finally, Ohio has previously tried unsuccessfully to prove its fraud claims on the merits. It therefore lacked the meritorious claim which is a prerequisite to Rule 60 (b) relief. After a full hearing on the merits, in which CLARK participated, upon Ohio's Petition for Reclamation in the Four Seasons Chapter X proceedings the court found:

> "There is no intimation in this record that Four Seasons defrauded the State of Ohio or made any misrepresentations to the State of Ohio, but at all times dealt above board and submitted all information requested and withheld nothing. Mr. Gardner [the Deputy Treasurer of the State of Ohio] made no reliance upon any alleged fraudulent document or statement made by the debtor corporation [Four Seasons], its officers or agents, and no fraud here exists, and no misrepresentations were made to the State of Ohio, or others." *In re Four Seasons Nursing Centers of America, Inc.*, 329 F. Supp. 647, 651-52 (W.D. Okla. 1971).

This decision was affirmed by the Tenth Circuit:

> "We likewise reject appellant's [Ohio] argument that the prime rating relied upon by the Ohio State Treasurer in making these loans was obtained through Four Seasons' materially false statements concerning its financial status. The trial court found no fraud or misrepresentation after an evaluation of the testimony presented before it in a full hearing. We hold this decision to be adequately supported by the record; there is no cogent reason to reverse the trial court on this point. Accordingly, we affirm the finding of no fraud or misrepresentation in obtaining the rating of prime from the National Credit Office." *State of Ohio* v. *Four Seasons Nursing Centers of America, Inc.*, 465 F.2d 25, 28 (10th Cir. 1972).*

Despite Ohio's failure to secure reclamation of its $4 million loan from the Trustee of the Four Seasons companies, Ohio has already recovered a substantial amount of the loans at issue. Ohio has received $1,375,000 in cash, an additional cash dividend of $195,000 and approximately 388,000 shares of stock in the presently viable company into which the Four Seasons companies were reorganized (ANTA Corporation). The stock has a book value of more than $6.00 per share, and Ohio admitted in the district court that the stock had a market value of at least $3.00 per share. Thus, Ohio has already recouped between $2,734,000 and $3,898,000 of its $4 million investment.

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* CLARK argued to the district court in a summary judgment motion that, applying the principles of *res judicata* and collateral estoppel, these decisions bar Ohio's present claims. The district court rejected the *res judicata* argument, and held that the application of collateral estoppel as to each particular claim of Ohio must be determined upon the record developed at trial, not upon summary judgment. *In re Four Seasons Securities Laws Litigation*, __F.R.D.__ (W.D. Okla. 1974). The two decisions rejecting Ohio's fraud-based reclamation petition, nevertheless, establish the weakness on the merits of Ohio's fraud claims now at issue.

In these circumstances, the decision of the Tenth Circuit was correct and proper.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October Term, 1974
No. 74-379

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

The briefs of Respondents are directed substantially and, in the case of Clark, primarily at the merits of the issues raised by Ohio and not to the importance of a resolution of them by this Court. This focus on the merits underscores the "certworthy" quality of the issues presented by Ohio's Petition. A statement of Ohio's arguments on the merits would be inappropriate at this time. Yet, one point in the Clark Brief in Opposition warrants clarification.

Clark urges that the denial of Ohio's Petition for Reclamation in the Four Seasons Chapter X reorganization

shows that Ohio lacks a meritorious claim justifying relief under Rule 60(b). Clark Opp. Br. pp. 35-36. Only in a footnote does Clark mention that the District Court overruled his Motion for Summary Judgment based upon the res judicata and collateral estoppel effects claimed to flow from the denial of Ohio's reclamation petition. *Id.* at p. 36. Contrary to the intimation of that footnote, the opinion of the District Court on Clark's motion has been reported. It is found at 370 F. Supp. 219 (W.D. Okla. 1974). An attempted interlocutory appeal from this decision by Clark under 28 U.S.C. §1292(b) was rejected by the Tenth Circuit. In re Four Seasons Securities Laws Litigation, Misc. No. 74-8031 (10th Cir. entered March 13, 1974).

The res judicata branch of Clark's Motion for Summary Judgment was denied on the ground that the proceedings upon Ohio's Petition for Reclamation were in rem and therefore not supportive of res judicata in a later action in personam. 370 F. Supp. at 232. The court further held that Ohio was not precluded by collateral estoppel from prosecuting its federal securities laws claims against Clark, but without prejudice to Clark's right to raise a collateral estoppel argument at trial as to any questions of fact determined by the Tenth Circuit on Ohio's reclamation petition. 370 F. Supp. at 238.

To support his view, Clark quotes at some length from Judge Bohanon's opinion denying Ohio's Petition for Reclamation. Clark Opp. Br. p. 35. That quotation must be placed in context by Judge Bohanon's later statements. In his remarks on November 2, 1971, not included in his later written opinion, after a hearing upon allowance of certain claims in the reorganization proceedings, Judge Bohanon said:

"The Court now has before it the problem first of whether or not Equity and Four Seasons were in effect one and the same. They worked together, as a joint adventure, helping one another, and helping Jack Clark and his robbers, and that is what they were—nothing short of just rob the American people." App. pp. A27-A28.

The decision of Judge Bohanon upon Ohio's Petition for Reclamation cited by Clark was rendered July 14, 1971. The broad assertions then made of no wrongdoing by Four Seasons' personnel are plainly inconsistent with Judge Bohanon's later description of Respondent Clark. The opportunities for Ohio to establish its claims on the merits are open, subject only to the limitations of collateral estoppel upon such factual issues as may have been determined by the Tenth Circuit.

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